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United States
Circuit Court of Appeals

For the Ninth Circuit.

IDAHO-OREGON LIGHT AND POWER COMPANY, IDAHO RAILWAY,
LIGHT & POWER COMPANY and O. G. F. MARKHUS, as Receiver of
IDAHO RAILWAY, LIGHT & POWER COMPANY,

Appellants,

vs.

STATE BANK OF CHICAGO, BANKERS TRUST COMPANY, F. N. B. CLOSE,
A. W. PRIEST, WILLIAM H. FORSTER, H. D. MILES, EDWARD J.
MULLER, GEORGE E. FISHER, W. D. WILLARD, Personally and as a
Bondholders Committee, W. J. FERRIS, as Receiver of IDAHO-OREGON
LIGHT & POWER COMPANY, UNITED STATES OF AMERICA,
IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COM-
PANY, WESTINGHOUSE ELECTRIC & MANUFACTURING COM-
PANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Appellees.

A. W. PRIEST, W. D. WILLARD, WM. H. FORSTER, H. D. MILES, EDWARD
J. MULLER, GEORGE E. FISHER, D. M. LORD, JOHN R. ALLEN,
W. O. CARRIER, ALLEN HOLLIS, CHARLES L. PARMELEE and
CHARLES M. SMITH, Interveners, and Being a Protective Committee for
the Holders of the First and Refunding Bonds of the IDAHO-OREGON
LIGHT & POWER COMPANY,

Cross-Appellants,

vs.

IDAHO RAILWAY, LIGHT & POWER COMPANY, O. G. F. MARKHUS, Re-
ceiver of IDAHO RAILWAY, LIGHT & POWER COMPANY, IDAHO-
OREGON LIGHT & POWER COMPANY and W. J. FERRIS, Its Receiver,
BANKERS TRUST COMPANY, F. N. B. CLOSE, UNITED STATES
OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL
ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC AND MANU-
FACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL &
WIRE COMPANY,

Cross-Appellees.

Transcript of Record.

Upon Appeal and Cross-Appeal from the United States
District Court for the District of Idaho,

Southern Division.

Filed

DEC 15 1914

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

IDAHO-OREGON LIGHT AND POWER COMPANY, IDAHO RAILWAY,
LIGHT & POWER COMPANY and O. G. F. MARKHUS, as Receiver of
IDAHO RAILWAY, LIGHT & POWER COMPANY,

Appellants,

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STATE BANK OF CHICAGO, BANKERS TRUST COMPANY, F. N. B. CLOSE,
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MULLER, GEORGE E. FISHER, W. D. WILLARD, Personally and as a
Bondholders Committee, W. J. FERRIS, as Receiver of IDAHO-OREGON
LIGHT & POWER COMPANY, UNITED STATES OF AMERICA,
IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COM-
PANY, WESTINGHOUSE ELECTRIC & MANUFACTURING COM-
PANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Appellees.

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CHARLES M. SMITH, Interveners, and Being a Protective Committee for
the Holders of the First and Refunding Bonds of the IDAHO-OREGON
LIGHT & POWER COMPANY,

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vs.

IDAHO RAILWAY, LIGHT & POWER COMPANY, O. G. F. MARKHUS, Re-
ceiver of IDAHO RAILWAY, LIGHT & POWER COMPANY, IDAHO-
OREGON LIGHT & POWER COMPANY and W. J. FERRIS, Its Receiver,
BANKERS TRUST COMPANY, F. N. B. CLOSE, UNITED STATES
OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL
ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC AND MANU-
FACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL &
WIRE COMPANY,

Cross-Appellees.

Transcript of Record.

Upon Appeal and Cross-Appeal from the United States
District Court for the District of Idaho,
Southern Division.

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*In the District Court of the United States for the
District of Idaho, Southern Division.*

IN EQUITY—No. 444.

STATE BANK OF CHICAGO, Trustee,
Plaintiff,
vs.
IDAHO-OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY, and F. N. B.
CLOSE,
Defendants.

BILL IN INTERVENTION OF A. W. PRIEST,
WILLIAM H. FORSTER, H. D. MILES, ED-
WARD J. MULLER, GEORGE E. FISHER,
AND W. D. WILLARD, PERSONALLY
AND AS A BONDHOLDERS' COM-
MITTEE.

*To the Honorable, the Judges of the District Court
of the United States, for the District of
Idaho, Southern Division.*

The interveners, A. W. Priest, William H. Fors-
ter, H. D. Miles, Edward J. Muller, George E.
Fisher, and W. D. Willard, by leave of Court first
had and obtained, respectfully present this their Bill
in Intervention in the said cause, and show :

I.

That the said plaintiff filed its bill for foreclosure herein on the 7th day of July, 1913; that the said defendant, Idaho-Oregon Light & Power Company, filed its answer herein on the 5th day of August, 1913, and that the said defendants, Bankers Trust Company and F. N. B. Close, filed their answers herein on the 9th day of August, 1913. That on the 5th day of August, 1913, the said cause was, at the instance of counsel for said Idaho-Oregon Light & Power Company, set for trial on the 11th day of August, 1913.

II.

That the said suit is brought to foreclose the Trust Deed or Indenture of Mortgage securing what is known as the first and refunding bonds of the said Idaho-Oregon Light & Power Company, which said bonds and Deed of Trust bear date of April 1st, 1907. That the said Trust Deed conveys to the State Bank of Chicago, complainant herein, as Trustee, all of the property, both real and personal, and all the rights, franchises and privileges of said Idaho-Oregon Light & Power Company, hereinafter for convenience called the Power Company, which it then owned, and all of the property, both real and personal, and all rights, franchises and privileges which the said Power Company might thereafter acquire; that the total amount of bonds authorized to be issued under said Trust Deed is \$7,000,000.00, of which amount there have been actually certified

by the Trustee and delivered to the Power Company 3,319 bonds to the aggregate amount of \$3,319,000.00.

III

That the interveners, individually, own bonds so issued to the amount of \$137,000.00, and that, as a protective committee, representing other bondholders who have deposited their bonds with the interveners as such committee and vested in them the legal title, they hold and have the legal title to additional bonds of said issue to the amount of \$224,000.00, and also hold certificates issued by the depositaries of another alleged bondholders' committee, hereinafter named, representing bonds to the amount of \$71,000.00; that the aggregate amount of said bonds thus represented by the interveners is \$432,000.00.

IV.

That the said Power Company was organized under the laws of the State of Maine in the year 1907, with an authorized capital of \$7,500,000.00, which was afterwards increased to \$10,000,000.00; that the persons principally concerned therein, and who became thereupon its chief stockholders and its president, secretary, and members of its board of directors, were William and Sinclair Mainland; that the said Power Company proceeded immediately upon its organization to acquire certain properties in the State of Idaho, and also, at or about the same time, certain properties in the State of Oregon ad-

jacent to the first named properties, and also a filing upon a water right for power purposes and a site for the construction of a power plant at what is known as the Ox Bow Bend of the Snake River, upon the border of the States of Idaho and Oregon, said power site being in Baker County, Oregon; that the said Power Company proceeded to operate the properties so acquired by it, and proceeded also with the construction of the power plant at the Ox Bow Bend, and enjoyed a large and rapidly increasing gross income, and also a large net income, increasing at a still more rapid rate until and including the year 1911; and that under date of February 25, 1911, the said William Mainland, then and now president of the said Power Company, in a statement made to the public respecting the estimated future earnings of the Power Company said that the net earnings for 1911 would be \$463,702.00, and for 1912 \$898,000.00, and the previous history of the Power Company's business, together with the increased capacity to be furnished by the Ox Bow plant, which was to be completed under arrangements then being made, apparently justified these estimates.

The Power Company paid the interest on all the first mortgage bonds from time to time issued and outstanding for all the years from 1907 to 1911, inclusive, and, according to the official audits made by public accountants for said Company, showed a large and increasing surplus over and above the payment of such interest; that in the years 1908, 1909, and 1910 the Power Company paid out of such sur-

plus, or alleged surplus, the sum of \$91,152.17 in dividends upon the stock of said Power Company.

V.

That in the year 1911 the Power Company, either directly or through the said William and Sinclair Mainland, for the purpose of obtaining additional money with which to complete the Ox Bow plant, entered into a contract with Kissel, Kinnicutt & Company, a co-partnership engaged in the banking and brokerage business, and being members of the Stock Exchange of the city of New York, said partnership being composed of G. Herman Kinnicutt, Samuel L. Fuller, Horace Bacon, R. H. Kissel and Robert Bacon, the exact terms of which contract are unknown to the interveners, an inspection of the same having been requested of said Power Company and such inspection refused. The interveners are informed, however, and believe and aver the fact to be that the said contract bound Kissel, Kinnicutt & Company to purchase \$1,500,000.00 of an issue of bonds secured by a so-called consolidated first and refunding mortgage, which was in fact a second mortgage upon all the properties of the Power Company, and junior to the mortgage above referred to securing the bonds held by these interveners. In connection with and as a part of the said contract, the said Kissel, Kinnicutt & Company demanded the issuance to them of a large amount of stock of said Power Company, as to the exact amount of which the interveners are not informed, but which the in-

terveners are informed and believe to have been not less than \$3,200,000.00 of par value, and sufficient to give the said Kissel, Kinnicutt & Company an equal voting power in said Power Company with the said William and Sinclair Mainland.

The relations of the said William and Sinclair Mainland to the Power Company and to its issues of stock, and to Kissel, Kinnicutt & Company, and to a certain corporation hereinafter referred to, known as Idaho Railway Light & Power Company, will be hereafter more specifically set forth.

The interveners are further informed and believe and charge that immediately upon the obtaining of the said large amount of stock of the Power Company, as above stated, Kissel, Kinnicutt & Company proceeded to acquire other stock, by purchase or otherwise, so as to give them a majority of the stock of said Power Company and put them in control thereof.

That immediately upon so acquiring control of the said Power Company the said Kissel, Kinnicutt & Company organized, or caused to be organized, another corporation under the laws of the State of Maine, known as Idaho Railway Light & Power Company, with an authorized capital of \$30,000,000.00, which said Company proceeded to execute its Trust Deed bearing date December 1, 1911, to the Guaranty Trust Company of New York, as Trustee, to secure an authorized issue of \$30,000,000.00 so-called first and refunding mortgage sinking fund gold bonds.

That having so acquired control of the Power Company, and having organized, or caused to be organized, the Railway Company, Kissel, Kinnicutt & Company transferred the stock of the Power Company which they held to the said Railway Company, and also, as the interveners are informed and believe, induced the said William and Sinclair Mainland to so transfer their stock, so that at the time of the making of the mortgage of the Railway Company to the Guaranty Trust Company, as above set forth, the Railway Company was the holder of 19,250 shares of the preferred capital stock of the Power Company, or a total of 77,650 shares out of a total authorized issue of 100,000 shares, having therefore more than three-fourths of all of the authorized capital stock of said Power Company and a still larger proportion of the capital stock then issued.

That the said Kissel, Kinnicutt & Company having a large majority of the stock of the Railway Company so far issued and being in complete control of the Railway Company, and, through such control, also in control of the Power Company as above set forth, caused persons of their selection to be elected directors and officers of the Railway Company, and persons of their selection to be elected directors and officers of the Power Company, and that such officers and directors were for the most part the same persons, thus placing both corporations under the same management and both in control of said Kissel, Kinnicutt & Company, and that there was thereupon

effected a substantial physical consolidation of the Power Company's properties with the properties acquired by the Railway Company, and the said Railway Company and the said Power Company had, and continued to have, the same president, the same secretary, the same manager, superintendent, and other chief employees, and were substantially under one and the same management and control.

That in the latter half of 1911 there were acquired certain properties in the said district in which the Power Company was operating, to-wit: the so-called Swan Falls Power Plant, the Boise Valley Railway, and the Boise Interurban Railroad, together with transmission lines to and distributing plants in several towns and villages adjacent to or in the territory occupied by the Power Company; that these properties were, as the interveners are informed and believe, acquired under cover of the name of the Power Company and ostensibly in its interest, but that when so acquired they were in fact turned over to the said Idaho Railway Light & Power Company, hereinafter for convenience called the Railway Company.

VI.

That prior to the acquisition of the said properties, particularly the Boise Valley Railway, the traction properties were valuable customers of the Power Company, and that upon the said Boise Valley Railway passing into the hands of the Railway Company the officers and directors thereof, having the Power Company also under their control, wrongfully termi-

nated the agreement or agreements between the traction company and the Power Company, and transferred and turned over to the Railway Company the said business, thereby reducing the business and income of the Power Company and reducing its ability to meet its obligations to the interveners and other bondholders.

That later, in the year 1912, the said Railway Company purchased what was known as the Boise Railway, being the local street car system in the City of Boise; that the said Boise Railway was at the time under contract for a term of years to purchase its power of the Power Company upon terms highly profitable and advantageous to the Power Company; that immediately upon its acquisition by the Railway Company the latter wrongfully caused the said contract to be cancelled and transferred the said business to it, the said Railway Company, thus again greatly reducing the income and business of the Power Company and wrongfully depriving it of the means with which to meet its just obligations to the interveners and other creditors.

That the business of the Power Company is furnishing electric current for power and lighting purposes, and that it seeks to do a general power and lighting business throughout the entire territory reached by its lines and adjacent territory readily reached thereby; that in the various estimates of the anticipated business and income of the Power Company that have been put out from time to time to induce the public to buy its bonds, it has shown large

amounts of business to become available from time to time in furnishing power for pumping plants, mining enterprises and other industries in said territory; that since the organization of the Railway Company, the Railway Company has extended its transmission lines into a part of the same territory in which business is transacted by the Power Company, and the interveners are informed and believe that much of the business properly and naturally expected by the Power Company has been wrongfully diverted by the Railway Company, and that this has been brought about while the Power Company, being under the control and domination of the Railway Company as above appearing, has been compelled to stand helplessly by.

VII.

The interveners further show that under the said mortgage of the Railway Company authorizing an issue of \$30,000,000.00 of bonds, the Railway Company has issued \$6,500,000.00 of said bonds, and that the same have been purchased or contracted to be purchased by said Kissel, Kinnicutt & Company with a view of reselling the same to the public; that the said bonds have not in fact been sold to the public, and the interveners are informed and believe and charge the fact to be, that they have not been marketable for the reasons hereinafter set forth.

That said Kissel, Kinnicutt & Company not being able to dispose of the said bonds to the public have, as these interveners are informed and believe and

charge the fact to be, pledged the said bonds to various banking institutions as security for loans and that such bonds are now held in large quantities by the said Guaranty Trust Company of New York, the Bankers Trust Company of New York, the Chase National Bank of New York, Winslow, Lanier & Company of New York, and the First National Bank of New York.

That the principal reason why the said Kissel, Kinnicutt & Company have not been able to dispose of the said bonds to the public is that the properties so acquired by the said Railway Company have not been sufficiently profitable, and that they have not been and are not now earning sufficient to meet their operating charges, adequate provision for depreciation, and to pay the interest upon the excessive and exorbitant prices paid for said properties, and for which said \$6,500,000.00 of bonds were issued.

The interveners show that Kissel, Kinnicutt & Company and their associated banks have now been carrying this load for nearly two years, and that it became clearly necessary to consummate the plan of acquiring the property of the Power Company in such a manner as to get additional security behind the said bonds of the Railway Company, and especially to show added earning capacity in order to render the said Railway bonds marketable and avoid an enormous loss on the \$6,500,000.00 of such bonds; and the readily available course was to get rid of the first mortgage bonds of the Power Company by the easy device of a foreclosure at which there would

be and could be no bidder except the Railway Company, and thus seize the property and earnings of the Power Company.

VIII.

That, as before stated, the purpose of the Power Company and of the Mainlands in executing the second or so-called consolidated mortgage of the Power Company, and in contracting for the sale of \$1,500,000.00 of bonds secured thereby to Kissel, Kinnicutt & Company, was to obtain funds for the completion of the Ox Bow plant, which would have provided the Power Company with ample power for its light and power business and enabled it largely to increase its earnings, to have realized the net earnings estimated by the said William Mainland, as above set forth; that this was a valuable contract to the Power Company upon which it relied. But the said Kissel, Kinnicutt & Company, contrary to the provisions of the said agreement, and in violation of the rights of the Power Company thereunder, have performed the same only in part, and, at a date of which the interveners are not informed but which they believe to have been subsequent to January 1st, 1913, being in control of the Power Company as aforesaid, caused the Power Company, without consideration, to release them, the said Kissel, Kinnicutt & Company, from the said contract at a time when it was impossible to obtain funds from other sources, to the great injury of the Power Company.

That although the purpose of the sale of said \$1,500,000.00 of bonds was to furnish funds for the

completion of the Ox Bow plant, the money actually received by the Power Company from such bonds as were taken and paid for by Kissel, Kinnicutt & Company under said contract, was not in fact applied in large part to the completion of the Ox Bow plant, but was, under the domination and control of the Railway Company (controlled as aforesaid by Kissel, Kinnicutt & Company), diverted to other purposes to the great injury of the Power Company and its creditors; and the interveners charge that this was done in pursuance of the scheme of the Railway Company and Kissel, Kinnicutt & Company to reduce and divert the income of the Power Company, break down its credit, cause it to default in its obligations, and to purchase its property for a nominal amount, to the fraud and injury of the holders of the first mortgage bonds of the Power Company.

IX.

The interveners further show that the surplus income of the Power Company, after the payment of all operating expenses and interest, for the years from 1907 to 1912, both inclusive, were as follows:

1907,	\$ 40,709.41
1908,	49,640.17
1909,	74,548.26
1910,	131,545.41
1911,	146,532.52
1912,	59,654.28 (deficit)

That the Railway Company obtained the complete domination and control of the Power Company in

the latter part of 1911, and exercised such complete domination and control for the first complete year during the year 1912; that for the years 1910, 1911, and 1912, the operating income, operating expenses proper, the commercial and general expenses, and the total expenses charged to operation were as follows:

	1910.	1911.	1912.
Operating . . .			
Income, . . .	\$297,041.43	\$361,297.47	\$402,039.95
Operating . . .			
Expenses . .			
Proper, . . .	51,335.82	56,870.59	87,880.62
Commercial .			
and General,	31,190.17	71,529.05	101,437.48
Total Operat-			
ing,	82,526.01	128,399.63	189,318.10

That it thus appears that the operating expenses increased fifty-five per cent. (55%) in 1912 over those of 1911, while there was at the same time an increase of only eleven (11%) per cent. in operating income; that the commercial and general expenses in 1911, during part only of which year the Railway Company had control, were nearly one hundred thirty per cent. (130%) more than they were in 1910, while the business increased only twenty per cent. (20%); that the commercial and general expenses for 1912 increased more than forty-two per cent. (42%), while, as above stated, the operating income increased only eleven per cent. (11%); and that the total operating expenses proper and commercial and

general expenses in 1912 were \$189,318.10, while the same charges for the year 1910, the last year before the Railway Company had any control of the Power Company, were only \$82,526.01. In other words, while the operating income increased about thirty-four per cent. (34%), the expenses charged to operation increased about one hundred thirty per cent. (130%).

The control and domination of the Railway Company over the Power Company is thus shown to have been destructive of its business and income, an attack upon the security of the bonds held by your interveners, and your interveners charge that this control and domination were exercised for the purpose of depreciating such security and enabling the Railway Company to carry out the scheme of purchasing the Power Company's property, and the proposed reorganization, which is shown in the plan attached to the Bill of Complaint herein, and of which the default in interest, alleged in the Bill, and this suit to foreclose are a part.

The interveners show that there are no reasons, aside from the change of management and control and the domination of the Railway Company over the Power Company in the interests of the Railway Company, which in any substantial way justify or account for this enormous increase in expenses.

X.

The interveners charge that the obtaining of the control of the Power Company by the Railway Com-

pany was the beginning of a plan then formed for the absorption of the business and properties of the Power Company without just and true compensation therefor, of which the management of the Power Company by the Railway Company, the alleged defaults in the payment of interest on the Power Company's bonds in April, 1913, the plan of re-organization prepared and put out in advance of such alleged default, and the foreclosure herein instituted, are all a part; that early in the year 1912 plans were prepared for the actual absorption of the Power Company by the Railway Company; that about the month of December, 1912, in preparation for the proposed default which was not to occur until three months later, the responsible persons who had theretofore been elected directors of the Power Company by the Railway Company, were caused to resign and other persons were substituted in their stead in order that the same persons should not be directors of both the Railway Company and the Power Company when the final ruin of the Power Company should be brought about. That prior to the occurrence of any default, either actual or pretended, on the first of April, 1913, the Railway Company caused to be appointed a committee to obtain and carry out the absorption of the Power Company's properties, such committee being constituted as follows:

Charles E. Bockus, connected with Old Colony Trust
Company, Boston, Massachusetts;

L. B. Franklin, connected with Guaranty Trust Com-
pany of New York;

Samuel L. Fuller, connected with Kissel, Kinnicutt
& Company of New York;

William Mainland, President of the Railway Com-
pany;

Homer W. McCoy, bond dealer, Chicago, Illinois;

Daniel E. Pomeroy, connected with Bankers Trust
Company of New York;

Stacy C. Richmond, connected with Winslow, Lanier
& Company of New York.

Of this committee N. D. Putman, Jr., an employee of the Guaranty Trust Company of New York, was made Secretary, and the said Fuller was made Chairman. Three of the members of this committee are representatives of banks which were concerned in the organization of the Railway Company and which are large holders of its bonds and stock, either as pledgees or otherwise, and they are not, to the best of the knowledge and belief of these interveners, in any way interested in the first mortgage bonds of the Power Company. A fourth is Samuel L. Fuller, the chief promoter and the controlling factor in the affairs of the Railway Company. A fifth is the president of the Railway Company, who, though formerly a large holder of the stock of the Power Company, has exchanged that stock for stock of the Railway Company. A sixth is a representative of a banking connection in Boston of the first four, and was put on the committee as an inducement to the large number of holders of Power Company bonds residing in New England. The interveners are informed and believe, and charge the fact to be that neither the said Bockus nor the Old Colony Trust Company is

the owner or holder of any of the bonds of the Power Company. The seventh is a Chicago broker who sold about ten per cent. (10%) of the total outstanding first mortgage bonds of the Power Company, but who does not now and did not at the time of his appointment as a member of said committee own or hold any of the said first mortgage bonds of the Power Company, and was put on the said committee for the purpose of persuading the bondholders that they were being represented thereon.

The said committee was selected and appointed wholly by and in the interests of the Railway Company and for the purpose of promoting and protecting those interests, and not in any sense, manner, or degree in the interest or for the protection of the holders of the first mortgage bonds of the Power Company and the pretense that they were appointed and acting on behalf of such bondholders and as representing the interests of said bondholders was false and fraudulent and intended to deceive and mislead the bondholders and forestall any action by the bondholders in their own interest, which would otherwise have promptly been instituted upon the occurrence of the default on April 1st, 1913.

The interveners show that subsequently, and prior to the putting out of the plan of May 1st, 1913, the said Fuller, as chairman of the said committee, was requested by addition or substitution to place on the said committee actual bondholders, nominated or selected by the holders of such first mortgage bonds, and the said Fuller refused such request.

The interveners respectfully show that the deposit of the first mortgage bonds of the Power Company held by the said so-called protective committee, which will be for convenience called the New York committee, has thus been obtained by fraud, mis-representation and deceit, and that they are not as respects any proceeding in a court of equity entitled to be recognized as representing said bonds, and that the Trustee, the complainant herein, being now charged with full knowledge of the character and purposes of said committee has no right to act at the instance or upon the demand and request of the said committee, as representing the bonds so obtained by such misrepresentation, fraud and deceit.

The interveners further show that the holders of a large number of the bonds which have been deposited with the said New York committee have repudiated the said committee and have demanded the return of the bonds so deposited, but that the said committee has evaded and refused to comply with such request.

The New York committee, anticipating the alleged default of April 1st, 1913, caused to be prepared and mailed to the first mortgage bondholders of the Power Company, under date of March 26, 1913, five days before the occurrence of the alleged default, a circular letter accompanied by a plan of re-organization. This circular letter stated that the Railway Company was the owner of first and refunding bonds of the Power Company to the amount of \$718,000.00, of the so-called consolidated or second mortgage

bonds of the Power Company to the amount of \$854,000.00, of notes secured by \$500,000.00 face value of the consolidated bonds to the amount of \$250,000.00, and of preferred and common stock of the Power Company to the value of \$8,563,500.00; and the circular goes on to say, "manifestly, therefore, both on account of its large holdings of the securities of the Oregon Company (meaning the Power Company), and because of its dominant position as the owner of very large consumers of power in the territory served by the Oregon Company (referring to the Boise Valley Railway, Boise Interurban Railroad, and the Boise Railway, heretofore mentioned), the co-operation of the Railway Company will be essential to the success of any plan for the re-adjustment of the finances of the Oregon Company." The circular also offered that the New York committee would "advance" to bondholders depositing with it, the interest maturing April 1st, 1913, and that such depositors would not be called upon to bear any part of the expense of carrying out the proposed plan of reorganization.

The said plan embodied in the deposit agreement, which accompanied the said circular, was in substance that the Power Company's properties should be stripped of its liens, except the lien of certain underlying divisional bonds, and transferred to the Railway Company and placed under the lien of the Railway Company's \$6,500,000.00 of bonds outstanding, thus in fact more than doubling the security of said bonds, and that to the owners of the first mort-

gage bonds of the Power Company should be given instead of such first mortgage bonds a sort of adjustment income bond, bearing nominally five per cent. (5%) interest, but upon which interest was to be paid only if and when earned, and which interest should not be cumulative. So far as can be judged from the description of the proposed mortgage securing the said adjustment bonds, there never could be any default thereon, nor any resort by the owners of said bonds to any of the property of the company for the payment of the said bonds.

The bondholders of the Power Company did not in fact deposit their bonds in any considerable number with the New York committee under this proposal, and thereupon the New York committee invited to New York representatives of the brokerage houses which had sold the Power Company's bonds to the public, about six in number, for the purpose of persuading them to recommend the plan of the New York committee to the bondholders of the Power Company; daily sessions with the said Fuller, who represented the New York committee, and his counsel were had for about two weeks, resulting in the preparation by said Fuller and his counsel of a revised plan, to which the representatives of the brokerage houses were induced to give their assent. This plan was put out under date of May 1st, 1913, and is the same as the plan of March 26th, except that for the proposed income bond is substituted a second mortgage bond upon the property of the Railway Company, with interest for the first year at two per cent.

(2%), the second year at three per cent. (3%), the third year at four per cent. (4%), and thereafter at five per cent. (5%).

Acting upon agreements thus obtained by the said Fuller, the brokerage houses referred to sent out to their customers who were holders of the first mortgage bonds of the Power Company circular letters, either expressly advising assent to the plan and the deposit of their bonds with the New York Committee, or stating that the best that could be done with the committee had been obtained, and that such acceptance and deposit was the only thing open to the bondholders.

The interveners respectfully point out to the Court that the individual bondholder does not, except by the merest chance, know who any other bondholder is, nor has he any names and addresses of his fellow bondholders, and that he universally and necessarily looks for information, advice and guidance to the brokerage house which sold him his bonds, which he looks upon as responsible to him with regard thereto, and that the individual bondholder is in fact virtually helpless in such a situation as was thus created, and that having waited anxiously after the receipt of the first proposal, and having been informed by his broker that negotiations were being had with a view to obtaining better terms, and being then informed by his broker that the best possible terms had been obtained, he saw no course open to him but to comply with that advice, and the New York Committee claims that a large majority of the first mortgage

bonds were deposited with the New York Committee under the plan of May 1st, 1913. All of these things were fully known to and relied upon by the Railway Company in the preparation and carrying out of its scheme for the absorption of the Power Company's properties.

XI.

Thereupon, a few bondholders having obtained such names and addresses, relatively few in number, as was possible under the circumstances, caused meetings of holders of first mortgage bonds of the Power Company to be held in Chicago and New York, and the interveners were appointed a committee of and by such bondholders for the purpose primarily of obtaining information as to the character, value and prospects of the Power Company's properties, the reason for the alleged default, and the character, value and prospects of the properties of the Railway Company upon which a second mortgage bond was offered them in exchange for their first mortgage bonds on the property of the Power Company. The interveners sought this information of the New York committee, of the Power Company, of the Railway Company and of Kissel, Kinnicutt & Company, but for the most part such information was refused and denied; they were refused the right to inspect the books of record of the Power Company, the books of records of the Railway Company, the names of the persons who were directors of the Power Company, the names of the persons who were directors of the Railway Company, the names and addresses

of their fellow bondholders of the Power Company, with whom they desired to communicate for their mutual protection and advantage, the operating reports of the Railway Company at any time, and the operating reports of the Power Company for the period subsequent to January 1st, 1913, all of which information was in the possession of one or more, or all, of the persons and corporations named, and should have been freely supplied to these interveners as bondholders of the Power Company who were asked and requested to dispose of their property in exchange for bonds of the Railway Company, as aforesaid.

XII.

The interveners further show that the Railway Company was sometime in the early part of 1913 in possession and claiming the ownership of certain consolidated or second mortgage bonds of the Power Company; that thereupon the Railway Company demanded of the Power Company that it receive back these consolidated or second mortgage bonds and deliver to the Railway Company instead an equal amount of the first mortgage bonds of the Power Company, being a part of the \$3,319,000.00 of bonds alleged to be outstanding and upon which foreclosure is sought in this suit; that the Power Company, being as above shown fully under the control and domination of the Railway Company, necessarily acceded and did accede to this demand, and thereupon delivered and turned over to the Railway Company \$718,000.00 of the said first mortgage bonds, after

the Railway Company had collected the November, 1912, interest on the consolidated bonds. The interveners charge that the said consolidated bonds, in view of the alleged deficit in the earnings of the Power Company for the year 1912 and in view of the default and foreclosure then planned and anticipated, had no market value and were to all intents and purposes worthless, and that the said exchange of bonds was wholly without consideration and was, as to the interveners and the Power Company, wrongful and fraudulent, and that the said bonds are not, because of said issue and delivery by the Power Company to the Railway Company, issued and outstanding and valid obligations of the Power Company, but that the same should be by this Court called in and cancelled.

XIII.

The interveners further show that subsequent to the alleged default in the payment of interest, which occurred on April 1st, 1913, to-wit: on or about April 10, 1913, the Power Company, acting in respect thereto under the domination, authority and demand of the Railway Company, caused the Trustee to certify and deliver to it \$107,000.00 of the first and refunding mortgage bonds, which \$107,000.00 is a part of the \$3,319,000.00 of bonds alleged by the Bill of Complaint herein to be outstanding in the hands of bona fide holders, upon which foreclosure is sought herein. The interveners show that at the time of such certification the bonds in question had already been dishonored by the default in the payment of the

interest on the issue of which they were a part, and that the certification of said bonds was improper and unauthorized.

The interveners further show that although the said \$107,000.00 of bonds are alleged by the Bill of the complainant herein to be issued and outstanding and valid obligations of the Power Company, that in fact they are not so outstanding, but that the same have never been sold or passed into the hands of bona fide holders for value, and that the said bonds are not a part of any valid obligation under the said Trust Deed and should be by this Court ordered cancelled.

XIV.

The interveners show that according to the allegations of the Bill herein there are now outstanding in the hands of persons who are owners and holders thereof for value, \$1,770,000.00 of the second or so-called consolidated bonds of the Power Company; and of these the interveners are informed and declare that all but \$166,000.00 have been issued since Kissel, Kinnicutt & Company and the Railway Company obtained control of the Power Company, and that the amount so arrived at, to-wit: \$1,604,000.00 of the said bonds, or approximately that amount, have by some means passed into the hands of Kissel, Kinnicutt & Company and the Railway Company. The interveners show also that since the Power Company passed into the control of the Railway Company there have been certified by the Trustee, the com-

plainant herein, and delivered to the Power Company first mortgage bonds of the Power Company to the amount of \$520,000.00 and that those bonds also have passed into the hands of Kissel, Kinnicutt & Company and the Railway Company, and that therefore a total of \$2,124,000.00 of additional bonded indebtedness of the Power Company has been created since the control by Kissel, Kinnicutt & Company and the Railway Company was obtained, and that all, or approximately all, of such bonds have, as aforesaid, passed into the hands of Kissel, Kinnicutt & Company and the Railway Company.

The interveners show that in spite of the creation of this vast additional indebtedness, and in spite of the fact that the contract that was made with Kissel, Kinnicutt & Company in 1911 was for the express purpose of obtaining the completion of the Ox Bow project, very little has been done in fact upon the Ox Bow and that such expenditure as has been made there has been ineffective and wasteful, because pursued in a desultory fashion and without any purpose of carrying through promptly and economically the completion of the said project; that no important additions have been made during that time to the other property of the Power Company, and that as a matter of common knowledge of those having any familiarity with the property, additions to the value, or anything approximating the value, of \$2,000,000.00 have been made to the property during that period. On the other hand, during this same period the same persons and financial interests controlling the Power

Company, and being also in control of the Railway Company, have spent largt sums of money in developing and increasing the capacity of Swan Falls Power Plant belonging to the Railway Company, which is actually in some respects and is potentially in all respects a competitor of the Power Company; and that the said Fuller, in stating reasons why the first mortgage bondholders of the Power Company should submit to the demands of the Railway Company, as put forth by the New York committee, has declared that if the bondholders did not submit to such plans the plan of re-organization would be abandoned, the Swan Falls plant would be enlarged to its full capacity, and could and would take away the business of the Power Company.

The interveners show that it is imperative in the interests of the bondholders and in the furtherance of justice that a full inquiry and accounting shall be had respecting the disposition of these bonds and respecting the enormous amount of money which should legitimately and properly represent the proceeds thereof, and that this should be done before there is a sale of the property of the Power Company for the purpose of paying its debts.

XV.

The interveners further show that although, as before stated, the contract with Kissel, Kinnicutt & Company expressly stated that its purpose was to provide funds for the completion of the Ox Bow, and the mortgage securing the consolidated bonds also declares that they are issued for the purpose of com-

pleting the Ox Bow, that since that time the said Fuller has publicly made statements derogatory to the Ox Bow Project, has said that the same would likely be abandoned, and has made other statements derogatory to the financial interests and reputation of the Power Company; that prior to the said contract with Kissel, Kinnicutt & Company, approximately \$2,000,000.00 of bonds had been issued on account of the Ox Bow, entailing an annual interest charge of about \$120,000.00; that this charge was an entire loss so long as the Ox Bow should remain uncompleted, and that it was imperative that the project should be pushed promptly to completion; that, nevertheless, as hereinabove appears, nothing substantially was done upon the Ox Bow project. The interveners show that the Ox Bow project contemplates the creation of an enormous amount of power, amounting to 35,000 or 40,000 horse power; that according to the plans and reports of responsible and competent engineers, the project can be completed for a relatively small amount of money, and that, especially taking into consideration the large sum of money already spent before Kissel, Kinnicutt & Company and the Railway Company came into control, power can be produced there at less cost than at any other point in the district.

The interveners show that if the Ox Bow had been completed as planned, and for which ample financial resource has in fact actually been created and has existed, the present catastrophe in the Power Company's affairs could never have been brought about;

and the interveners charge that the failure of the persons in control of the Power Company since 1911 to complete the Ox Bow project has been deliberate and for the purpose of wrecking the Power Company, obtaining its property for a nominal sum, and then after that has been done completing the Ox Bow project to the great profit of the persons who have thus seized and appropriated the same. The interveners further show that since the formation of the New York committee, alleged to be a protective committee for the holders of the first mortgage bonds of the Power Company, the chairman of the said Committee, the said Fuller, has openly attacked the character and value of the Power Company's property, has alleged that the Power Company was a company without power, that such property as it had was, because of the lack of power and for other reasons, largely worthless, and that he would give practically nothing for it; that the entire management of the affairs of said committee are practically in the hands of the said Fuller, and that not only is he acting actually in the interest of the Railway Company and against the interest of the holders of the first mortgage bonds of the Power Company, but, while holding the position of chairman of said committee and while retaining possession and control of first mortgage bonds deposited with him as a trustee for and in protection of the interests of the owners thereof, he has openly and violently attacked the interests of those bondholders so as to depreciate the value of their security, and has used every means in his power to prevent the sale of their security at an adequate price.

XVI.

The interveners further show that the property of the Power Company consists of many divers and widely scattered units; that much of it is portable and removable, and some of it is shifting and changeable in its character; that the business of the Power Company consists in furnishing electric current for light and power in a large number of communities and to an extremely large number of individuals and corporations; that its income is derived wholly or exclusively from contracts with such individuals and corporations for the furnishing of such current; that a large portion of its business is conducted in competitive territory where competitors can and will obtain the customers and supply their wants immediately if the Power Company shall for any reason fail or refuse to do so; that it is impossible for any person outside of the Railway Company and the Power Company, which is in the control of the Railway Company, to know or to determine, without the assistance of persons now connected with those companies, what the property of the Power Company is, or of what its business consists; and it is impossible for the court to determine, except by the appointment of a Receiver and by the inspection, assembling and scheduling of the property by such Receiver, or to know what is to be sold under any decree of foreclosure or sale, or as to what and where the property is which is to be delivered to any purchaser thereat; that if a decree of sale were entered and the property remained in the hands of the adverse interests at present in pos-

session thereof, much of the property could be readily sequestered, concealed and disposed of, and the contracts upon which the business and income of the Power Company depend, and without which the property itself is of small value, could be terminated or abandoned and their value lost and destroyed; that, in short, it is absolutely impossible that there should be an identification, scheduling, valuation, inspection and exhibition to purchasers and sale of the said property without first placing the same in the power and possession of the court, through the court's Receiver.

XVII.

The interveners further show that although the Power Company refused payment upon the interest coupons on the first mortgage bonds which were due April 1st, 1913, and thereby occasioned default therein, that such failure and refusal was due to the domination and control of the Railway Company, and was a part of the scheme for the acquisition of the property of the Power Company by the Railway Company through this foreclosure, and that immediately thereafter and before the declaration of default by the Trustee, the said interest was in fact paid to the bondholders who are said to seek this foreclosure, and paid in part by the Trustee which is the complainant herein, payment being made as offered and proposed in the said circular of March 26th to all those bondholders who deposited their bonds with the New York committee, and that, therefore, although a formal and technical default was created, no actual default

now exists as to any of the bonds deposited with the New York committee, and that this discrimination against the bondholders who have refused to deposit with the New York committee is fraudulent and wrongful, and that the acts and things set forth give the complainant no right to maintain the foreclosure herein.

XVIII.

The interveners further show that, having been refused inspection of the books and records of the Power Company, they are not fully informed as to who are the stockholders thereof, but that the circular of March 26th, above referred to, asserts, and the interveners are otherwise informed and believe, that \$8,563,500.00 of the par value of such stock is owned and held by the Railway Company; the interveners are not informed as to the circumstances of the issue of all of this stock, or the consideration paid therefor, but they respectfully show that \$4,050,000.00 thereof was issued, either directly or indirectly, to the said William and Sinclair Mainland in alleged payment for the filing upon a water right at the Ox Bow Bend of the Snake River, above referred to; that the said issue of this enormous amount of stock, \$250,000.00 of which was six per cent. preferred cumulative stock, in alleged payment for the said filing was a merely colorable device for transferring the said stock to the said Mainlands without payment or consideration therefor, and that no actual payment was then or has ever been made for such stock, or any part thereof.

The interveners further show that in the year 1911, and in connection with the contract above referred to by which Kissel, Kinnicutt & Company agreed to purchase second mortgage bonds of the Power Company and obtained thereby control of the Power Company, there was issued ostensibly to one R. M. Burtis, but actually to and for the benefit of Kissel, Kinnicutt & Company, \$800,000.00 of said preferred stock and \$2,100,000.00 of common stock in alleged payment for a filing on a water right at the so-called Salmon Falls of the Salmon River; that at the same time it is said that \$8,494.22 additional was paid in cash to cover sums alleged to have been paid by Burtis for surveyors' fees and expenses, but the interveners believe and charge the fact to be that such fees and expenses had been paid in the first instance by the Power Company, and that the actual equitable title to the said water rights was already in the Power Company, Burtis holding the nominal title thereto as a Trustee for the Power Company, and that said stock was issued wholly without consideration; that at the same time and in connection therewith, \$300,000.00 of additional stock was issued to William and Sinclair Mainland in alleged payment generally for past services; that both of these issues were contrived for the purpose of turning the said stock over to Kissel, Kinnicutt & Company in carrying out the agreement to give them an equal voting power with the said William and Sinclair Mainland in the Power Company, and that no consideration whatever has ever been paid for the said stock by any of the persons named.

The interveners show that all of this stock was issued as fully paid, although, as above set forth, no payment therefor was actually made, and that there is therefore now due to the Power Company large sums of money, amounting to many millions of dollars, in payment for the said stock from the said William and Sinclair Mainland, Kissel, Kinnicutt & Company, the Idaho Railway Light & Power Company, and such other persons as may have connived with them and have received and hold any of the said stock; that if payment for the said stock to the Power Company were made, the said Power Company would be enabled to discharge all of its obligations, meet all of its requirements for capital, complete the Ox Bow plant, and be put in a position to carry on its business profitably and to serve the community efficiently and economically.

XIX.

The interveners respectfully show that by means of the premises, the Power Company has passed under the domination and control of the Railway Company, which is a competitor and whose interests are adverse to the interests of both the other stockholders and of the creditors of the Power Company; that under the domination and control of the Railway Company the Power Company has been and is being stripped of its business and income, and its expenses enormously and improperly increased for the express purpose of depreciating and finally sequestering the property of the Power Company constituting the security of these interveners and its

other creditors; that conspiring and contriving to bring about a foreclosure of the first mortgage upon the property of the Power Company, not for the purpose of protecting the interests of the creditors secured thereby but solely for the purpose of obtaining the property of the Power Company at a nominal price and adding it to the property of the Railway Company, and thus adding to the value of the securities held by the persons in control of the Railway Company, the alleged default of April 1st, 1913, was brought about; that this default, while actual as to these interveners and other bondholders not assenting to the plan of re-organization devised by the Railway Company for its purposes and profit, was nominal as to the bonds controlled by the Railway Company, and that as to such bonds the interest has actually been paid; that under the control and domination of the Railway Company an actual consolidation of the property of the Power Company with the property of the Railway Company has been, to all intents and purposes, effected, so that the same persons are executive officers, managers and superintendents of both properties, to the manifest injury of the Power Company and its creditors; that if a foreclosure and a sale of the properties of the Power Company be had at the present time and under the circumstances now existing, it will not result in the payment of the debts of the Power Company, but will result in the sacrifice of its property and in the loss of the security of its creditors, and will redound only to the benefit of

the Railway Company, which has planned and now seeks to carry out such foreclosure, and which intends, as shown by the said plan of re-organization, to be the only purchaser at such sale, and which openly boasts that nothing can be done with the property of the Power Company except by its consent and co-operation; that it is absolutely essential to the protection of the Power Company's property and its creditors that the property of the Power Company be forthwith segregated from the property of the Railway Company and removed from the domination and control of the Railway Company. That unless this court by appropriate action takes possession and control of the property of the Power Company and removes it from the adverse possession of the Railway Company, its value will inevitably be sacrificed and destroyed. That the persons now in control of the Power Company, to-wit: the Railway Company, Kissel, Kinnicutt & Company, and William and Sinclair Mainland, either directly or through their ownership of the stock and securities of the Railway Company, are largely indebted to the Power Company upon stock which has been improperly and fraudulently issued to them without consideration therefor, and that it is through such stock so improperly and fraudulently issued that they have obtained and exercise the control and domination over the Power Company above referred to. That if the Power Company can recover and be put in possession of the moneys lawfully due it for this stock, which, to the amount of

millions of dollars, has been issued as fully paid for but actually without being paid for at all, it will be enabled to meet all its just obligations and carry on its business successfully and profitably. That there has been, as above shown, issued by several devices bonds of the Power Company to the amount in one case of \$107,000.00, and in another case to \$718,000.00 which are alleged to be valid and outstanding obligations of the Power Company, but which in fact are not such valid and outstanding obligations, which should be surrendered and cancelled and if so surrendered and cancelled would thereby greatly reduce the alleged obligations of the Power Company and the interest charges against its income. That to properly protect the interests of these interveners and other creditors of the Power Company, and to protect the true interests of the Power Company itself, an accounting should be had between the Power Company and Kissel, Kinnicutt & Company, the Power Company and the Railway Company, and the Power Company and William and Sinclair Mainland, under the auspices and by the authority of this Court, and that this may be accomplished it is necessary that a Receiver of the Power Company be appointed to assert the rights of the Power Company against the persons and corporations named; that, as a matter of course, no one outside of the Railway Company can be found to bid at any sale of the Power Company's property, unless such bidder can have full information as to the location, character and quantity of such prop-

erty, and an opportunity to fully inspect the same; that any such bidder must also have full information as to the operating history and results of the property; that the property itself and all information regarding it is in the hands of the Railway Company, and that all avenues of information are closed; that even the representatives of the interveners who would wish to bid if any such sale were had, if necessary to protect their interests, have been refused the necessary information, and William Mainland, the President of both the Power Company and the Railway Company, has refused to give the representatives of the interveners a letter of introduction to the local Manager of the Power Company, authorizing him to show such representatives over the property, though requested thereto.

Wherefore, the interveners, on behalf of themselves and all other persons in like relation to the said Company and its property, respectfully pray:

First: That the parties to said cause be directed to answer this Bill, or so much thereof as concerns each of such parties, respectively, but not under oath, all answers under oath being hereby expressly waived, and that appropriate orders and subpoenas issue accordingly.

Second: That for the purpose of segregating the property of said Power Company from the property of the Railway Company and identifying and determining the character, quantity, description and location thereof; for the purpose of removing the

said property from the possession and control of interests adverse and antagonistic to the interests of the bondholders and other creditors of the Power Company, as well as protecting the rights, interests and property of said Power Company, and to secure as far as possible the performance of the duties which said Power Company owes to the public, and to prevent the loss and forfeiture of lease-holds, water rights and other property and interests; for the purpose of enforcing the rights and equities of the creditors of the Power Company against persons and corporations who are or may be indebted to the said Company, and to obtain and enforce accountings against persons and corporations who have obtained possession and control of bonds, moneys and other property of the Power Company, and who ought to account therefor; for the purpose of obtaining free access to the property of the said Power Company and information regarding the same on the part of prospective bidders, if the said property shall finally be sold to pay its bondholders and other creditors, this Court forthwith appoint a Receiver of all and singular the property, rights, assets, and franchises of every nature and wherever situated, held, owned, or controlled by said Power Company, together with all water rights, lease-holds, rights and contracts, with full authority to manage and operate the same under the direction of the Court; and that all of the officers, managers, superintendents, agents and employees of the said Power Company be required forthwith to deliver up to such Receiver the possession of

all and singular each and every part of the said property wherever situated; and also all books of account, vouchers, bonds, contracts and papers belonging to said Power Company, or in any way relating to its business; and for an injunction restraining each and every of the officers, directors, managers, superintendents, agents and employees of the said Power Company from in any way interfering with the possession and control of such Receiver over said property.

Third: That the said Receiver be directed to collect and recover from any and all persons and corporations whatsoever all moneys, bonds and obligations belonging to said Power Company, including the collection and recovery from stockholders of said Company who hold stock thereof which they have not paid for, so far as the same may be necessary to meet the just debts and obligations of the said Company.

Fourth: That the creditors of said Power Company of all classes be required to present and establish their claims in this Court.

Fifth: That the Court, being then fully advised by the proceedings in this cause and by its Receiver, what is the amount, character and value of the property and assets of the Company, and what is the amount of its debts and obligations, their character and priorities and to whom owed, if it shall be found necessary, cause the physical plants, properties, rights and franchises of the said Power Company to be sold, either in parcels or in their entirety as shall be most advantageous and advisable, and the pro-

ceeds thereof applied, so far as the same may be necessary, to the payment of all of its just debts and obligations as the rights and priorities of its creditors shall appear.

Sixth: That the interveners and others in like relation may have such other and further relief as to the Court may seem proper, and as may be necessary to fully protect and enforce the rights and equities of the interveners and other persons in like relation.

A. W. PRIEST,
H. D. MILES,
GEORGE E. FISHER,
WILLIAM H. FORSTER,
EDWARD J. MULLER,
W. D. WILLARD.

By Joseph Cummins,
Of Chicago, Illinois,
Richards & Haga,
Of Boise, Idaho,
Their Solicitors.

United States of America,
District of Idaho, Southern Division,—SS..

Joseph Cummins, being duly sworn, on oath says: That he is one of the solicitors for the said interveners; that the said interveners are all non-residents of the said District, and that none of them is now present in said District; that he has made personal investigation and inquiry respecting the facts set out in the foregoing Bill, and that said facts therein are true of his own knowledge, except as

to the matters therein stated on information and belief, and as to those matters, he believes them to be true.

JOSEPH CUMMINS.

Subscribed and sworn to before me, this 16th day of September, A. D., 1913.

(SEAL)

EDNA L. HICE,
Notary Public.

(Endorsed): Filed September 19th, 1913. A. L. Richardson, Clerk.

IN EQUITY—NO. 444.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,
Plaintiff,

vs.

IDAHO-OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY, and F. N. B.
CLOSE,

Defendants,

And

A. W. PRIEST, WILLIAM H. FORSTER, H. D.
MILES, EDWARD J. MULLER, GEORGE E.
FISHER and W. D. WILLARD,

Intervenors.

AMENDMENT TO BILL IN INTERVENTION
OF A. W. PRIEST, WILLIAM H. FORSTER,
H. D. MILES, EDWARD J. MULLER,
GEORGE E. FISHER AND W. D.
WILLARD.

By leave of Court first had and obtained, the interveners, A. W. Priest, William H. Forster, H. D. Miles, Edward J. Muller, George F. Fisher and W. D. Willard, amend their said Bill by inserting in the middle of page 15 of said Bill, after the paragraph ending with the word "request," the following:

The interveners deny that the said New York Committee have deposited with them more than two-thirds of all the bonds properly issued and outstanding under the mortgage sought to be foreclosed, and allege that at least 825 of the bonds so claimed to be held by them are illegal or fraudulent, that many of those who have so deposited have repudiated and do now repudiate the right or authority of the New York Committee to act for them because of the fraud and deceit practiced in obtaining the deposit of said bonds, and that the complainant herein should be required to show that the request to foreclose, alleged in the Bill to Foreclose herein, was actually made by the holders of two-thirds of said bonds directly or by persons authorized to act for such holders.

Also on page 28 of said bill, at the end of the 18th paragraph thereof, the following

XVIII-a.

The interveners to further show the purposes of the Railway Company, that the Power Company is wholly under the domination of and acting solely at the behest of the Railway Company, and that the foreclosure is sought at this time only by the Railway Company and in its interest and not by or in

the interest of the creditors of the Power Company, attach to this Bill as Exhibit "A," a clipping from the Idaho Statesman of July 8, 1913, a daily newspaper published in Boise, Idaho, containing interviews with John F. MacLane, counsel for the defendant Idaho-Oregon Light & Power Company, and William Mainland, the president of both the Power Company and the Railway Company, which publication the interveners believe to be authentic.

Also by adding to the prayer of said Bill, on the 33rd page, the following:

Seventh: That the Court annul and declare illegal and void the seven hundred and eighteen (718) bonds obtained by the Idaho Railway Light & Power Company in alleged exchange for so-called consolidated bonds, and that the said Railway Company be made a party defendant to this Bill in Intervention and be required to answer the allegations of said Bill regarding said 718 bonds, and that a subpoena issue accordingly.

Eighth: That the defendant be required to show in detail what disposition has been made of the one hundred and seven (107) bonds certified and delivered to the defendant Power Company after default, and that if said bonds be still in its possession or control that they be ordered returned and cancelled.

Ninth: That the complainant be required to establish by complete and adequate proof, consisting of the names and addresses of bondholders who have requested said Trustee to declare the debt due and foreclose as alleged in its Bill and the number of

bonds held by each, that such a request was made by persons owning or representing the owners of such two-thirds of said bonds.

Tenth: That the decree of foreclosure and sale heretofore entered in this cause be vacated and set aside, to the end that the issues raised by this Bill of the interveners may be settled and disposed of before a final decree shall be entered.

A. W. PRIEST,
WILLIAM H. FORSTER,
H. D. MILES,
EDWARD J. MULLER,
GEORGE E. FISHER,
W. D. WILLARD,

By Joseph Cummins,
Of Chicago, Illinois,
Richards & Haga,
Of Boise, Idaho,
Their Solicitors.

Exhibit "A" to Bill in Intervention of A. W. Priest, et al. Clipping from Idaho Daily Statesman, July 8, 1913.

"REORGANIZATION
IDAHO OREGON COMPANY.

Friendly Suit Filed in Federal Court to Bring
About Big Consolidation.

TO FORECLOSE MORTGAGE.

Idaho-Oregon Light & Power and Idaho Traction to
Unite Forces.

Eugene E. Prussing, representing the State Bank of Chicago, filed a bill of foreclosure in the federal court in this city on Monday against the Idaho-Oregon Light & Power Company. The action is to foreclose the mortgage of \$3,319,000 held by the Chicago bank on the property of the company to secure a bond issue. The original bond issue was \$7,000,000, but only \$3,319,000 of this amount was disposed of.

The reason for the foreclosure was the default of the interest payment of \$95,345, due April 1 at the rate of 5 per cent. The mortgage covers all the hydro-electric power plants, stations, substations, transmission and distributing lines in Ada, Canyon and Washington counties in Idaho; and Malheur and Baker counties in Oregon, including the great Ox Bow plant still under construction.

Action was instituted in the federal court in the name of Leroy A. Goddard, president of the Chicago bank. The law firm of Cavanah, Blake & MacLane represents the power company in the matter.

First Step in Reorganization.

It was explained by officers and attorneys of the company that the filing of this bill of foreclosure was but the initial step in a reorganization of the company and a consolidation of the Idaho-Oregon Light & Power Company and the Idaho Traction Company; that it did not mean at all that the company is embarrassed, but simply that reorganization is considered advantageous to all interested parties. Assurance was given that the work of development and extension would go right on as before.

When asked for a statement after the filing of the bill on Monday, Judge John F. MacLane, speaking for the company said:

‘The bill filed this afternoon by the State Bank of Chicago to foreclose the first and refunding mortgage on the properties of the Idaho-Oregon Light & Power Company is a formal step in the reorganization of the Idaho-Oregon Company and is preliminary to the completion of the Ox Bow power development, near Copperfield, Ore.; and other proposed extensions of the company’s system.

‘When this mortgage was executed, the company’s management did not realize the rapidity with which demands would be made upon the company, both for power capacity and for extensions of transmission

and distribution lines, and the provisions of the mortgage were not made sufficiently elastic to permit the sale of bonds to meet the company's requirements. It is, therefore, necessary to liquidate the present mortgage against the company's properties, in order to put it in position to raise the funds to meet these demands.

May Be Consolidation.

'It is expected that, upon the reorganization, the Idaho-Oregon Light & Power Company will be merged into the Idaho Railway, Light & Power Company as a single corporation, under the latter name. This consolidation has always been anticipated since the formation of the Idaho Railway Company in the latter part of 1911, but has been delayed, pending the consummation of an agreement between stockholders and bondholders of the two companies as to a plan of reorganization, which has now been attained.

Creditors Not to Lose.

'In the proposed re-organization no creditor, bondholder or stockholder will lose anything, as it is expected to pay off every creditor of the company in cash and to issue new securities dollar for dollar to the bond-holders under the present mortgage; and all stockholders of the Idaho-Oregon Light & Power Company are entitled to participate in the reorganization on the same plan as their participation in the holdings of the Idaho-Oregon Company.

‘This foreclosure and the reorganization does not mean that the Idaho-Oregon Company is in a precarious state, nor that it has any creditors whose claims it is anxious to defeat. The step is rather a legal preliminary one to greater activities of the company in the future.’

Situation Not Serious.

Sinclair Mainland, who is in the city, was also seen with respect to the matter, and upon being shown the foregoing statement by the company’s attorney, said that it was correct and that there was nothing further to add, except that it might be said, with additional emphasis, that the situation was not serious and need give the public no concern, as the legal steps being taken were in the nature of a friendly reorganization within the company, and that neither the public nor any creditor should feel at all uneasy, either as to the future of the company or its ability to meet the demands—financial or otherwise—which would be placed upon it.”

Endorsed No. 444.

Filed September 16, 1913.

A. L. RICHARDSON,
Clerk.

(Endorsed) : Filed Sept. 19th, 1913. A. L. Richardson, Clerk.

IN EQUITY—No. 444.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,

Plaintiff,

vs.

IDAHO-OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY, and F. N. B.
CLOSE,

Defendants,

and

A. W. PRIEST, et al.,

Interveners.

ORDER.

This cause coming on to be heard upon the petition of A. W. Priest, William H. Forster, H. D. Miles, Edward J. Muller, George E. Fisher and W. D. Willard to intervene and their application to file an answer and Bill in Intervention herein, notice having been given to all parties, and the petition argued by counsel for all parties represented in the cause, and the Court being further advised by the argument of counsel as *amicus curiae*, and the Court being fully advised in the premises,

IT IS ORDERED:

1. That for the purposes, and subject to the limitations hereinafter explained, the said petitioners be, and they are, hereby permitted to intervene and become parties hereto, and to that end they may file their Bill in Intervention; leave to file the pro-

posed Answer is denied, but the same shall be placed in the custody of the Clerk of the Court for preservation as a part of the record upon the hearing.

Inasmuch as it appears, and all parties expressly concede, that the decree heretofore entered herein, namely, on August 20, 1913, reserves to the Court the full power to regulate and control, by proper orders made from time to time, all matters pertaining to the foreclosure sale prescribed by the decree, including the time when and the conditions upon which such sale may be consummated and title passed, and also reserves jurisdiction upon such sale justly to distribute the proceeds thereof, and to that end to adjudicate as between the several bond holders, without prejudice by reason of any finding or declaration in said decree, any and all questions touching the right of any bond or bonds to share in such proceeds, the intervention is expressly made subordinate to said decree, and such averments in said Bill in Intervention as serve only as the basis for the interveners' contention that the decree should be vacated and set aside shall be treated as surplusage, and ignored in the further proceedings of the case.

2. That the complainant and the defendant Idaho-Oregon Light & Power Company are required to answer all of the allegations in said Bill in Intervention relating to the 718 bonds, aggregating \$718,000.00 par value, secured by the first and refunding mortgage upon which foreclosure is sought here, which bonds are alleged to have been obtained by the Railway Company in exchange for so-called consol-

idated or second mortgage bonds, and that the said defendant Power Company make full disclosures with reference to its transactions in, and dealings with, and the present location, ownership, and control of the 107 bonds certified after April 1, 1913, and also in like manner answer relative to the 520 first mortgage bonds included in the 2124 bonds referred to in paragraph XIV of the Bill of Intervention.

3. That the Idaho Railway Light & Power Company be, and hereby is, made a party, for the purpose of answering the allegations of the said Bill in Intervention respecting the said 718 bonds, and that subpoena issue accordingly.

4. That the complainant and the defendant Idaho-Oregon Light & Power Company answer the allegations of the said Bill in Intervention as to the matter and manner of the payment of interest due April 1, 1913, under the mortgage herein foreclosed to a portion of the holders of the bonds secured by said mortgage.

5. That the answers in this order directed to be made by the parties already party to this cause be made within twenty days from the entry of this order: Provided, that the failure of any party to answer any averments of said Bill in Intervention not expressly required by this order to be answered shall not be construed as an implied admission that the same are true.

6. That in consideration of the express understanding upon the part of all concerned that what-

ever may be the phraseology of the decree in any particular respect, the court retains complete power and jurisdiction, without prejudice by reason of any recital or finding in the decree, to regulate and control the sale, and to make just distribution of the proceeds of the sale, as hereinbefore explained, the prayer of the petitioners that said decree be vacated is denied, and said decree shall not be regarded as being in any wise affected by reason of the intervention, and the same shall stand as the decree of the court: Provided, however, that the following paragraph is added to, and shall be deemed to be a part of, said decree, the same as if it had originally been incorporated therein, namely:

“It is further ordered, adjudged and decreed that if the property herein foreclosed shall be purchased at the sale held under this decree by any Committee of the holders of the bonds secured by said Deed of Trust to the complainant, acting as a reorganization committee, or by any person or corporation acting in pursuance of any plan or reorganization whereby any of the holders of the bonds secured by said Trust Deed are to receive in lieu of their distributive share in money of the proceeds of such sale, securities representing an interest in or based in whole or in part upon the same property, then all holders of the bonds secured by the Trust Deed to the complainant shall have equal opportunity within a time to be hereinafter fixed by this Court, to elect to take their distributive share of the proceeds of the sale in cash or to accept such new securities, and the issue of such

new securities shall be upon the same basis to all bondholders electing to accept the same."

Dated this 19th day of September, 1913.

FRANK S. DIETRICH,
District Judge.

Filed September 19th, 1913. A. L. Richardson,
Clerk.

IN EQUITY—No. 444.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO,

Plaintiff,

vs.

IDAHO-OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY, and F. N. B.
CLOSE,

Defendants,

and

A. W. PRIEST, et al.,

Interveners.

THE ANSWER OF STATE BANK OF CHICAGO
TO THE BILL IN INTERVENTION
OF A. W. PRIEST, ET AL.

This complainant for answer unto so much of said Bill in Intervention as it is required by the order of this Honorable Court entered of record herein on September 19, 1913, to make answer unto, answering, says:

I.

That it has no knowledge, information or belief respecting the acts and doings of any one with regard to or concerning the 825 bonds of said defendant Idaho-Oregon Light & Power Company referred to in paragraph X of said Bill of Intervention, excepts as follows below and it therefore denies all the allegations of said Bill of Intervention respecting said bonds, which in any wise conflict with this the answer of this complainant, to-wit.

II.

The said 825 bonds were certified by this complainant and delivered by it to said Idaho-Oregon Light & Power Company pursuant to the provisions of Article Two (2) of the Trust Deed from the said Company to this complainant, dated April 1, 1907, sought to be foreclosed in this cause—upon two requisitions therefor in due form and showing the facts and conditions required by said Article Two (2) to exist and be shown prior to such certification to the satisfaction of this complainant—and were so certified and delivered by this complainant in due course of business during the years 1912 and 1913, and in good faith in compliance with its duty as such Trustee under said Trust Deed—wherein it is expressly provided as follows:

“The Trustee shall not be in any wise responsible or answerable for the issuance or negotiation of any of the bonds which may be certified by it or delivered in accordance with the provisions of this deed of trust.”

III.

That except as informed by said Bill of Intervention, this complainant has no knowledge, information or belief respecting the manner or to whom said 825 bonds were disposed of by said Company—or how said Idaho Railway, Light & Power Company acquired the same if it did so, but it admits that 718 of said bonds are now held by and in the possession of the New York Committee, so called herein, under its agreement with the actual owners thereof—but this respondent does not know the present whereabouts of the remaining 107 bonds.

IV.

That this complainant has neither knowledge, information or belief respecting the allegations of paragraph XII of said Bill in Intervention, except as received therefrom and it therefore denies the same and leaves the petitioners to prove the same if it deems the same pertinent.

V.

That this complainant denies the allegations contained in paragraph XIII of said Bill in Intervention and answering the same respectfully shows and says, that on or about January 10, 1913, said Idaho-Oregon Light & Power Company applied in writing to this complainant as such Trustee for certification of bonds to the amount of 90 per cent of expenditures claimed to have been theretofore made by it and not covered by any other application, to the amount of \$126,589.91, for additions, improvements, extensions, enlargements, equipments or betterments to

its plants or property subject to said trust deed, and therewith submitted to this complainant the sworn statements of its engineer and general manager showing such expenditures in detail as required by said trust deed and with which this complainant might have been satisfied and upon which it might have acted by certifying and delivering 107 bonds to said Power Company—but this respondent carefully examining said statement found a clerical error in footing up the amount thereof which should have been \$119,834.91—and further acting under advice of its counsel and in pursuit of its discretion under said trust deed, this respondent after requiring said error to be corrected, required that it be advised by competent, expert, independent engineers, respecting existence of, additions, etc., and to propriety of said expenditures, and thereupon it employed at great expense Messrs. H. M. Byllesby & Company of Chicago, engineers of high standing, great experience and ability as well as financially responsible, to make an examination thereof and report in writing to this complainant.

VI.

That said engineers did make such examination and report which was delivered to this complainant about the tenth of March, 1913, and covered 36 pages of typewriting; that the same was considered by this complainant and its counsel until March 31, 1913, on which date counsel advised this complainant in writing that in his opinion on the basis of said report, the said Power Company seemed entitled to have certified and delivered to it 107 bonds and

thereupon on or about the 10th day of April, 1913, in due course of business this complainant certified and issued to said Power Company bonds numbered, both inclusive, being 107 bonds of \$1000 each, under said trust deed.

That this complainant does not know and has no information or belief respecting the ownership or holders of said 107 bonds at the time of filing its bill of complaint herein, or at any time since then, or what was done with said bonds, except this, that it was informed by said Power Company that the same had been pledged by it for a debt and that said bonds were in the hands of a pledgee.

VII.

That it denies the allegations contained in paragraph XVII of said bill in intervention that there has been any payment of the interest due April 1, 1913, on any of said bonds, and in respect to the alleged payment thereof to some of the bondholders seeking foreclosure herein, through or by this complainant, it says that the facts are as follows and not otherwise to-wit:

On May 1, 1913, the so-called New York Committee issued and sent to the bondholders aforesaid its circular letter and plan of reorganization of said Power Company and invited the deposit of the bonds aforesaid with it by said bondholders of which this complainant was one, and offered to loan or advance to such bondholders upon the security of said bonds and all the unpaid coupons belonging thereto, the amount of their defaulted coupons of April 1, 1913,

on certain conditions set forth in said circular and plan—That pursuant thereto there were deposited with this complainant by sundry bondholders a number of said bonds and the respective coupons, and this complainant as agent of said committee in that behalf advanced to such depositing bondholders thereon the amount of their respective April coupons, all of which is fully set forth and provided in said circular plan and a certain bondholders agreement, copies of which are attached hereto and made a part hereof and are marked Exhibits A, B and C. Said agreement provides in detail for such loan, the security therefor and the manner of its repayment—and this complainant is informed and believes that no part of the funds therefor belonged or came from said Power Company or its property, but the same were the property of said committee.

And having now fully answered said bill of intervention it prays to be herein dismissed with its costs.

STATE BANK OF CHICAGO,

By Eugene E. Prussing and
Sullivan & Sullivan,

Its Solicitors.

Service of a copy of the foregoing answer admitted this 30th day of September, 1913. Service of copies of three exhibits waived.

JOS. CUMMINGS,

RICHARDS & HAGA,

Attorneys for Interveners.

(Endorsed): Filed Sept. 30, 1913. A. L. Richardson, Clerk.

Exhibit A.

IDAHO-OREGON LIGHT & POWER
COMPANY.

First and Refunding Mortgage Bonds.

BONDHOLDERS' AGREEMENT,
Dated March 26, 1913.

Samuel L. Fuller,
Chairman,
Charles E. Bockus,
L. B. Franklin,
William Mainland,
Homer W. McCoy,
Daniel E. Pomeroy,
Stacy C. Richmond,
Committee.

N. D. Putnam, Jr.

Secretary,
30 Nassau Street,
New York City.

Rushmore, Bisbee & Stern,
Counsel.

AGREEMENT dated March 26, 1913, between Charles E. Bockus, L. B. Franklin, Samuel L. Fuller, William Mainland, Homer W. McCoy, Daniel E. Pomeroy and Stacy C. Richmond (herein called the "Committee"), parties of the first part, and such holders and registered owners of First and Refunding Bonds of Idaho-Oregon Light and Power Com-

pany (herein called the "Power Company"), as shall become parties hereto as herein provided (herein called the "Depositors"), parties of the second part:

Whereas, the Power Company is a Maine corporation and heretofore duly made its mortgage to State Bank of Chicago, as Trustee, dated April 1, 1907, to secure an issue of bonds known as its First and Refunding Gold Bonds of which \$3,212,000, face value, are issued and outstanding; and

Whereas, the Power Company is in urgent need of funds for its corporate purposes, and it is understood that its earnings during the past six months are not sufficient to enable it to pay the coupons on said Bonds that will mature April 1, 1913; and

Whereas, in order to avoid a foreclosure of the mortgage securing said Bonds, and to procure additional capital for the Power Company, the following plan has been evolved for the readjustment of the finances of the Power Company:

PLAN.

Idaho Railway, Light and Power Company, a Maine corporation (herein termed the Railway Company), to purchase all of the properties, rights and franchises of the Power Company, free and clear of all liens, except the following mortgages:

1. Mortgage dated October 1, 1901, executed by Boise-Payette River Electric Power Company, a West Virginia corporation, to the Mercantile Trust Company of the City of Boston, as Trustee (to which Trustee Old Colony Trust Company has be-

come successor), to secure an issue of \$500,000 of its Six Per Cent. Twenty Year First Mortgage Bonds, of which \$483,000 aggregate face amount are now outstanding.

2. Mortgage dated January 15th, 1904, executed by the Electric Power Company, Limited, an Idaho corporation, to the Bank of Commerce Limited, of the City of Boise, as Trustee to secure an issue of \$40,000 of its Six Per Cent. First Mortgage Gold Bonds, of which \$16,000 aggregate face amount are now outstanding.

3. Mortgage dated March 6th, 1907, executed by the Interstate Light and Water Company, a Washington corporation, to the Hewitt Land Company, of the City of Tacoma, as Trustee, to secure an issue of \$35,000 of its First Mortgage Five Per Cent. Twenty Year Gold Bonds, all of which are now outstanding,

for the consideration hereinafter stated; and, upon such purchase, to cancel the following securities of the Power Company now held by the Railway Company:

First and Refunding Bonds, face value..\$	718,000
Consolidated First and Refunding 6%	
Bonds, face value.....	854,000
Notes, face value (\$500,000 face value of	
Consolidated First and Refunding	
Bonds held as security also to be sur-	
rendered)	250,000
Preferred Stock, par value	2,148,400
Common Stock, par value	6,415,100

The Railway Company to create an adjustment mortgage covering all of its property, rights and franchises to secure an issue of \$2,494,000 face value of 5% bonds to be known as its Adjustment Mortgage Five Per Cent. Gold Bonds, the interest thereon to be paid if earned only and to be non-cumulative; said mortgage to constitute a lien upon all the properties, rights and franchises of the Railway Company and the Power Company when acquired subject only to the following:

1. First and Refunding Mortgage 5% Bonds of the Railway Company covering all the properties, rights and franchises of the Railway Company and of the Power Company when acquired . . . \$4,500,000
2. First Mortgage 5% Bonds of Boise & Interurban Railway Company covering only the properties formerly owned by that Company which are now owned by the Railway Company 1,073,000
3. First Mortgage 5% Bonds of the Boise Railroad Company covering only the properties formerly owned by that Company 389,000
4. Bonds subject to the lien of which the Power Company's properties are to be acquired 534,000

Railway Company to issue to the holders of the Power Company's First and Refunding Bonds \$1000 face value in Adjustment Bonds and \$250 par value

of Railway Company's Common Stock for each \$1000 face value of First and Refunding Bonds, and, as and when the same is required, to furnish \$1,250,000 additional capital for the purposes of the properties now owned by the Power Company; and

Whereas, the parties of the first part have been constituted a committee to carry out said plan upon the terms and conditions hereinafter set forth; and

Whereas, it is desirable that the holders of said bonds unite with the Committee in order that said plan may be effectively carried out and to this end the agreement hereinafter contained has been prepared and the deposit of said bonds thereunder invited;

Now, therefore, in consideration of the premises and of the consent of the parties of the first part to act as a committee and of the mutual promises and agreements hereinafter contained, the Committee agrees with the Depositors and the Depositors each for himself agrees with the Committee and with each other as follows:

First. The Committee is hereby vested under the terms of this agreement as Trustees of an express trust with the full legal and equitable title to all the bonds and coupons deposited hereunder by the Depositors for all and singular the purposes hereof, and the Depositors hereby assign and transfer the same to the Committee, and request the Committee to undertake and endeavor to effectively carry out the plan hereinbefore recited.

Second. The Committee is authorized to fill any vacancy in its number by vote or written appointment of the remaining members. Any member may resign by notice in writing to the Chairman of the Committee. Any action of a majority of the Committee whether at a meeting or in writing or otherwise shall be deemed the action of the whole Committee. No member of the Committee shall be personally responsible for the acts or contracts of any other member. The Committee may add to its number. The Committee as at any time constituted, and notwithstanding any vacancy or vacancies, shall have all the powers, rights and interests of the Committee as originally formed. Twenty-four hours' notice of meeting by letter or telegram shall be given, but such notice may be waived either before or after the meeting. Any member of the Committee may act by attorney either at any meeting or otherwise.

Third. Holders and registered owners of said First and Refunding Bonds may become parties to this agreement by depositing, within such period as the Committee may from time to time limit for that purpose, with any one of the depositaries hereinafter appointed all of said bonds held by them, in respect to coupon bonds with all unpaid coupons whether matured or unmatured thereto appertaining and in respect to registered bonds with such endorsements, transfers, assignments, proxies, powers of attorney, or other instruments as may be required by the Committee in order to enable it to transfer or assign a complete and absolute title to the deposited bonds.

The Committee may, in its discretion, either generally or in special instances and upon such terms and conditions as it may see fit to impose, limit, renew, extend or vary the period or periods of time within which the holders of said bonds may deposit the same hereunder and become parties hereto. The deposited bonds shall be held by the depositaries subject to the order of the Committee. Any of the depositaries may, upon the request of the Committee, appoint agents to accept the deposit of any of the bonds in its behalf, and under its direction to assist in the performance of any other duties imposed upon any of said depositaries either by this agreement or by the Committee; but neither the depositaries nor any of them, nor the Committee shall be responsible for the default or misconduct of any agent so appointed if selected in good faith. Neither the depositaries nor any of them nor the Committee nor any member thereof shall be liable for any action taken in good faith in the belief that any bond or other document or signature is genuine. Neither the Committee nor any member thereof nor the depositaries nor any of them shall be personally liable for any error of judgment or mistake of law or for anything other than willful malfeasance.

For every such deposit, a certificate issued by the depositary with whom the same is made, transferable as the Committee may determine and in such form as may be approved by the Committee, shall be delivered to the Depositor. The deposit of a bond or bonds and the acceptance of a certificate or certifi-

cates of deposit therefor shall have the same force and effect as though the Depositor had in fact executed this agreement with the intention of becoming a party thereto. Upon the transfer of any certificate of deposit, the transferee shall have all the rights of the original depositor and shall for all purposes be substituted for the prior holder, and the registered holder of the respective certificates of deposit may be treated as the absolute owners thereof, and neither the Committee nor the depositaries nor any one of them shall be affected by any notice to the contrary. The Committee may in its discretion from time to time cause the transfer books of certificates of deposit to be closed for such period or periods as it may deem expedient.

Fourth. The Committee shall have and may exercise in its discretion all the rights and powers of the respective owners or holders of the bonds and coupons deposited hereunder (including the right to vote at any meeting of holders of securities as fully as the Depositors) and shall have full powers to take all such measures and do all such acts as the Committee may deem proper for the purpose of carrying out the Plan hereinbefore recited, which is hereby expressly adopted and approved and made a part of this agreement, and to receive for and deliver to the holders of certificates of deposit the securities of the Railway Company as specified in said plan, or for the purpose of carrying out any modification thereof or otherwise. The Committee shall have and it is hereby given any and all powers which it may deem

necessary or expedient for carrying out or promoting the purpose of this agreement in any respect, though any such power be apparently of a character not now contemplated. The Committee may exercise any and every such power, whether herein enumerated or not, as fully and effectively as if the same were herein distinctly specified, and as often as for any cause or reason it may deem expedient, the methods to be adopted in carrying out this agreement being entirely discretionary with the Committee. The Committee also has power to construe this agreement and its construction of the same made in good faith shall be final, conclusive and binding on the Depositors. The Committee may supply defects and omissions herein, or make such modifications as in its judgment may be expedient or necessary to carry out the same properly and effectively, and its judgment as to such expediency or necessity shall be final. The Committee shall have power, whenever in its judgment it may be advisable, to amend this agreement. All amendments shall be filed with each depositary, but if in the judgment of the Committee, which shall be conclusive and binding, any such amendment shall materially affect Depositors, notice of such filing shall be given by publication and mailing in the manner provided in Article Ninth hereof, and, thereupon, Depositors shall have the same right to withdraw within thirty days as in the case of the adoption of a new plan.

Fifth. The Committee is especially authorized, as the owner of such deposited bonds and coupons to maintain any suit at law or in equity upon such

bonds and coupons or under or in connection with the mortgages securing the deposited bonds or either of them, or otherwise, and to take any action which the Depositors could have taken to compromise or settle any such suit or to waive any default under said mortgages or either of them and to intervene in any suit or proceedings; to collect any and all moneys which are or may become due or payable to the Depositors for principal or interest or otherwise upon the deposited bonds or coupons; to execute any demand upon or request to the Trustees under said mortgage and to cause said mortgage to be foreclosed if by it deemed advisable; in its discretion to purchase or join in purchasing at foreclosure or other sale the properties covered by said mortgage or any part thereof and to apply towards the payment therefor the bonds and coupons deposited hereunder. In case the Committee so purchases or joins in purchasing the mortgaged property, it may borrow such amount of money as may be necessary to pay to the holders of bonds not deposited hereunder their *pro rata* share of the purchase price and the expenses of foreclosure and sale, and may assign the bid or otherwise use the property so purchased to secure the repayment of the amounts so borrowed, and it may convey the property so purchased to the Idaho Railway Light and Power Company or may otherwise dispose of said property in its discretion, subject however to all conditions set forth herein. The enumeration of specific powers hereby conferred shall not be construed to limit or to restrict general powers herein conferred or intended so to be.

Any member of this Committee and any firm or corporation of which he may be a member or officer, director or stockholder, or otherwise connected with, and the Depositaries and any officer and agent of, or any person otherwise connected in any way with, any depositary may be or become pecuniarily interested in any property or matters which are or may become subject to this agreement, or to the Plan hereinbefore recited or any modification thereof or any new plan adopted under the authority of this agreement, and may make loans to, or otherwise contract or deal with the Committee in the same manner and to the same extent as if he were not so connected, and may likewise be interested in any securities of the Railway Company or of any other corporation affiliated with the Railway Company or the Power Company or related to the interests of the Power Company or the Railway Company or the Depositors.

Sixth. The Committee shall have the power to employ such depositaries, counsel, attorneys, agents or employees as in its judgment shall be necessary or useful. Neither the Committee nor any of its members shall be personally liable for any act or omission of any agent, attorney or employee selected in good faith.

Seventh. The Committee in its discretion may procure loans to the amount of the interest at any time unpaid on the bonds or of any of them deposited hereunder and may advance the amount of such in-

terest to such Depositors, and for that purpose the bonds and unmatured coupons on which loans are made may be pledged on such terms as the Committee may in its discretion determine, but no deposited bonds may be pledged for such purpose except the bonds on which said amounts of interest are advanced. On the carrying out of the plan hereinbefore recited, or any modification thereof, or any new plan adopted under the authority of this agreement, the Committee is empowered to make or adopt any equitable method it may deem wise for discriminating between holders of certificates who have availed of this privilege and those who have not, but in no event shall any holder who shall have received the amount of any such interest payment withdraw his deposit of bonds represented by such certificate, except on payment to the Committee of the said sum advanced to him, with interest thereon at the rate of 5% per annum to the date of withdrawal. If any sum be realized by the collection of coupons or interest installments, the amount of which has been advanced to any Depositors, the Committee will apply such sum to the repayment of said loans and interest.

Eighth. If for any reason the Committee shall consider it expedient at any time to terminate this agreement, it may do so by giving like notice of its election so to do as hereinafter provided in respect to the adoption of a new plan in Article Ninth hereof. In the event of such termination, every holder of a certificate of deposit shall, upon the surrender thereof, properly endorsed, to the Depositary issuing

the same or to its successor be entitled to the delivery of bonds of the Power Company to the amount represented by such certificate of deposit, without being required to pay to the Committee any compensation or to reimburse the Committee for the indebtedness, obligations and liabilities incurred by it hereunder, provided, however, that all Depositors shall be required to repay, with interest at the rate of 5% per annum, all sums advanced to them respectively by the Committee, before becoming entitled to the return of any bond or coupon deposited hereunder.

Holders of certificates of deposit, by the receipt of any securities, cash or property distributed by the Committee under the plan hereinbefore recited or any modification thereof or any new plan adopted under the authority of this agreement, or otherwise, or by the surrender of their certificates of deposit, will thereby release and discharge the Committee and the depositaries and each of them from all liability and accountability of every kind, character and description whatsoever.

Ninth. The Committee shall have power, if it shall deem it wise for any reason, to abandon the plan hereinbefore recited, to prepare and adopt a new plan for the readjustment of the finances of the Power Company, such plan to be in such form and to contain such terms and provisions as the Committee in its uncontrolled discretion may determine or it may approve and adopt any plan or agreement for such readjustment although not prepared by it.

When the Committee shall prepare or approve and adopt any such new plan, a copy thereof shall be filed with each of the depositaries and thereupon a brief notice of the fact of such preparation or approval and adoption and filing shall be published by the Committee at least twice in each week for two successive weeks in two newspapers of general circulation published in the Borough of Manhattan, City of New York, in one newspaper of general circulation published in the City of Chicago, in one newspaper of general circulation published in the City of Boston, and in one newspaper of general circulation published in the City of St. Louis, and by mailing on or before the date of its first publication to the registered holders of certificates of deposit at their addresses appearing on the registry books a copy of said notice; and such mailing and publication shall be conclusive notice as of the date of its first publication in any one of said Cities to all Depositors of the preparation or approval and adoption of such plan by the Committee and of the filing of a copy thereof with the Depositaries. Any registered holder of a certificate of deposit may within thirty days from the date of the first publication of said notice of the preparation or approval and adoption of said new plan by the Committee, withdraw from this agreement upon surrender to the Depositary who shall have issued the same a certificate of deposit properly endorsed in blank and upon prior payment to such Depositary for the account of the Committee of whatever amounts the Committee may have ad-

vanced him with interest thereon at the rate of 5% per annum; and any certificate holder not so withdrawing shall be deemed to have assented to said new plan and all the provisions thereof.

Tenth. This agreement may be executed in counterparts, and all such counterparts shall be taken as forming but one agreement. Upon the execution of the agreement singly or in counterparts, as the case may be, by the Committee or a majority thereof, a duplicate original thereof shall be deposited with each of the depositaries named herein.

Eleventh. Any notice from the Committee to a Depositor may be given by mailing the same with postage prepaid to the address of the Depositor as registered by him with any Depositary, and shall be deemed duly served upon such mailing.

Twelfth. The Guaranty Trust Company of New York, in the City of New York, the State Bank of Chicago, in the City of Chicago, and the Old Colony Trust Company, in the City of Boston, are hereby appointed depositaries for the purposes of this agreement. The Depositaries and each of them shall act as agents of the Committee and shall be protected in acting or omitting to act on instructions from the Committee. Any Depositary may resign and be discharged from all further obligations of every kind upon serving written notice of its resignation upon the Committee. The Committee shall have the power to appoint a new depositary at any time, and outstanding certificates of deposit shall have the same force as if issued by such new depositary.

Thirteenth. The Committee by the execution and delivery of this agreement is not under any obligation, legal or equitable, expressed or implied, to any holder of the said issues of bonds of the Power Company, who shall not deposit his bonds hereunder nor to any person whomsoever other than the holders of certificates of deposit issued in accordance with the terms of this agreement. This agreement shall extend to and be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns.

In witness whereof, the members of the Committee or a majority of them have subscribed this agreement as of the day and year first above written, and the parties of the second part have at different times thereafter deposited their First and Refunding Mortgage Bonds and coupons and have accepted certificates of deposit therefor.

Exhibit B.

To the holders of

Idaho-Oregon Light and Power Company,
First and Refunding Mortgage Bonds:

The Idaho Oregon Light and Power Company (sometimes herein termed the Oregon Company) was organized for the purpose of consolidating a number of properties then supplying electric current in Southwestern Idaho and to develop and extend in that territory and in Eastern Oregon the use of electricity for power, lighting and other commercial purposes. The principal source of new power sup-

ply then contemplated was the large development possible at the Ox Bow on the Snake River (herein termed the Ox Bow). For its general corporate purposes and to construct the works at the Ox Bow, the Oregon Company authorized an issue of \$7,000,000 of First and Refunding Bonds, and secured the same by a mortgage covering all of its properties, rights and franchises. Under this mortgage, bonds have been issued substantially as follows:

For properties purchased and for connect-	
ing up and improving them.....	\$ 500,000
For development of the Ox Bow.....	1,974,000
For equipment, extensions and better-	
ments	738,000
Total	<u>\$3,212,000</u>

Under the terms of the said mortgage no additional bonds secured thereby can be issued for the work at the Ox Bow. As the cost of that work proved to be far greater than the first estimates, in order to continue it, the Oregon Company has, in addition to the proceeds of said \$1,974,000 of First and Refunding Bonds, expended thereon considerable sums from earnings and the proceeds of approximately \$800,000 of junior securities. While interest has heretofore been paid on all of these bonds, no income whatsoever has been received from the Ox Bow investment and none can be obtained without large additional expenditures.

For the purpose of keeping pace with the demand for power in its field, the Oregon Company has found

it necessary during the past year to make large expenditures for the extension of its transmission lines, the construction of additional transforming stations and placing under ground its wires in the City of Boise. It has also been compelled to make large payments under contracts previously made for machinery to be installed and work done at the Ox Bow. Although necessary and calculated eventually to add greatly to the value of the Oregon Company's properties, the greater part of these expenditures were of such nature that they could not proportionately increase its earnings. Accordingly, while gross earnings increased, operating expenses, taxes and interest charges also increased to such an extent that the operations for 1912 show a deficit of more than \$48,000.

If, notwithstanding this situation, the Oregon Company is to add to the power which it controls and to continue its policy of extensions and betterments in advance of the actual demands of its patrons and thus realize in the future its present inchoate possibilities, additional capital must be provided at once.

The earnings for 1912, were made under non-competitive conditions which admitted of the sale of power at satisfactory rates. The present situation is, however, further complicated by the fact that since the beginning of this year, an active competitor has completed its transmission lines into Boise and has cut rates on power for all purposes. These rates the Oregon Company has been compelled to meet, and so severe is the reduction that it is estimated that,

at the rates now in force, net earnings for 1913 will be reduced about 40%, which, upon the basis of present interest charges, will result in a deficit of more than \$140,000. Under these conditions, it is obvious that the Oregon Company can find no market for any of its bonds and that, unless by agreement of the parties in interest fixed charges can be greatly reduced, it must go through a drastic compulsory reorganization. Because of the situation above described, the undersigned were, at the request of holders of a large amount of the Oregon Company's securities, constituted a Committee to consider the situation and make such suggestions in the premises as it should deem to be best for all parties concerned.

The Idaho-Railway Light and Power Company (hereinafter termed the Railway Company) is the owner of the following bonds, notes and stock of the Oregon Company, viz:

First and Refunding Bonds	\$ 718,000
Consolidated First and Refunding Bonds	854,000
Notes (secured by \$500,000, face value, Consolidated First and Refunding Bonds)	250,000
Preferred Stock (par value)	2,148,400
Common Stock (par value)	6,415,100

Manifestly, therefore, both on account of its large holdings of the securities of the Oregon Company and because of its dominant position as the owner of very large consumers of power in the territory served by the Oregon Company, the co-operation of

the Railway Company will be essential to the success of any plan for the readjustment of the finances of the Oregon Company. Indeed, without the assistance of the Railway Company, it was difficult to perceive how any readjustment could be brought about except through the slow process of a receivership. By reason of the foregoing, the Committee has taken up the matter with the Railway Company and, after careful consideration of the entire situation, is able to report that it has arranged with the Railway Company to consent to a readjustment of the relations of the two Companies and of the obligations of the Oregon Company, upon the following basis:

If the Oregon Company can be placed in a position where its properties, rights and franchises may be conveyed to the Railway Company free and clear of all liens, except underlying divisional bonds issued by companies consolidated into the Oregon Company, the Railway Company will cancel its \$718,000 of the Oregon Company's First and Refunding Bonds, and will create an Adjustment Mortgage, covering all of its property, rights and franchises, to secure an issue of 5% bonds, which it will exchange, par for par, for the \$2,494,000 First and Refunding Bonds of the Oregon Company held by others; and will also issue to each bondholder such number of shares of its common stock as at the par value thereof will equal 25% of the face value of his bonds. In such event, the Railway Company will also cancel its \$854,000 of the Oregon Company's Consolidated

First and Refunding Bonds, and the notes of the Oregon Company held by it aggregating \$250,000, and will surrender \$500,000 of such Consolidated Bonds which are held as security for said notes.

In the events aforesaid, as further consideration for the transfer of the property of the Oregon Company, the Railway Company will, as the same shall be required, furnish for the purposes of the properties now held by the Oregon Company additional capital to the extent of \$1,250,000. Because it is surrendering these very large claims, and arranging to supply such additional capital, the Railway Company has stipulated that interest shall be paid on the Adjustment Bonds only when and as earned, and that such interest shall not be cumulative. As appears from the foregoing figures, the Oregon Company's properties will have cost the Railway Company \$4,316,000 face value in bonds and notes, represented by \$2,494,000 face value of its Adjustment Bonds, and \$1,822,000 face value of the bonds and notes to be cancelled.

The properties of the Railway Company now include railway lines comprising a total of 72.31 miles and other properties as follows:

1. What was formerly known as the Boise Valley Railway, as lately re-located and rebuilt by the Railway Company, together with a new railway from Nampa to Caldwell.
2. What was formerly known as the Boise and Interurban Railway.

3. What was formerly known as the Boise Railway in the City of Boise, together with large holdings of real property in the City of Boise.

4. The hydro-electric plant at Swan Falls which, with improvements lately installed, will develop 7,330 horse power, normal rating, together with about 93 miles of transmission lines from Nampa to Caldwell, Star, Eagle, Pierce Park, Murphy, Dewey and Silver City, including transformer sub-stations and complete electrical equipment for furnishing light and power in places mentioned.

If the proposed arrangement is put into effect, to the foregoing will be added all of the property of the Oregon Company.

The Adjustment Mortgage Five Per Cent. Bonds will be a lien upon all of the properties mentioned, and when issued will be subject only to the following:

- (a) First and Refunding Mortgage
5% Bonds of the Railway Company covering all the properties, rights and franchises of the Railway Company and of the Oregon Company when acquired \$4,500,000.00
- (b) First Mortgage 5% Bonds of Boise & Interurban Railway Company covering only the properties formerly owned by that Company which are now owned by the Railway Company 1,068,000.00

(c) First Mortgage 5% Bonds of the Boise Railroad Company covering only the properties formerly owned by that Company and now owned by the Railway Company	389,000.00
(d) Bonds subject to the lien of which the properties of the Oregon Company are to be acquired	534,000.00
Total	<u>\$6,491,000.00</u>

On the basis of estimated earnings under the present severe competition and cut-rate conditions existing in Boise and the neighborhood, it is estimated that the income from the combined properties will show interest earned upon the Adjustment Bonds to the extent of approximately 4% during the present year 5% during the year 1914, and 6% during the year 1915.

As against the foregoing, taking the earnings of the Oregon Company on the same basis as in the preceding estimate, under existing conditions, the amounts earned and applicable to the payment of interest on the First and Refunding Mortgage Bonds now outstanding will be at the rate of 2.4% for the year 1913, 2.8% for the year 1914 and 3.6% for the year 1915.

In this connection, it must also be considered that, unless the work of the Ox Bow is completed with reasonable diligence, the Company's rights there will abate and its entire investment therein will be lost.

As it is apparent that some definite course of procedure must be adopted at once, the only alternative to the plan proposed would seem to be for the bondholders to take over the property and themselves finance its development.

Having been designated as a Protective Committee to carry out said plan, the undersigned invite deposits of bonds under the terms of an agreement which has been prepared for that purpose, and which designates the following depositaries:

In the City of New York—Guaranty Trust Company of New York.

In the City of Chicago—State Bank of Chicago.

In the City of Boston—Old Colony Trust Company.

Copies of said agreement, which provides, among other things, that the Committee will, upon the security of the bonds received, advance to depositing bondholders the amount of their coupons maturing April 1st, and that depositors will not be called upon to bear any part of the expense of carrying out said plan, may be had on application to any one of said depositaries.

Transferable certificates will be issued by each depositary for all bonds received.

For a summary of the secured indebtedness of the Oregon Company and of the Railway Company now outstanding, and that which will be outstanding on

the consummation of this plan, reference is made to the schedule hereto attached.

Dated March 26th, 1913.

Charles E. Bockus,
Old Colony Trust Company, Boston,
L. B. Franklin,
Guaranty Trust Company of New York,
Samuel L. Fuller,
Kissel, Kinnicutt & Co., New York,
William Mainland,
Wm. & S. Mainland, Oshkosh, Wisconsin,
Homer W. McCoy,
McCoy & Co., Chicago,
Daniel E. Pomeroy,
Bankers Trust Company, New York,
Stacy C. Richmond,
Winslow, Lanier & Co., New York,
Committee.

Secretary:

N. D. Putnam, Jr.,
Care Guaranty Trust Company of New York,
30 Nassau Street,
New York City.
Rushmore, Bisbee & Stern,
Counsel.

PLAN FOR READJUSTMENT OF THE RELATIONS OF IDAHO-OREGON LIGHT & POWER
COMPANY AND IDAHO RAILWAY LIGHT & POWER COMPANY.

Names	Description of Securities	Now Outstanding	Cancelled	Exchanged	Outstanding After Consumma- tion of Plan
Idaho Oregon Light & Power Co.	<i>Prior Lien Bonds covering portions of properties only:</i> Boise Payette River Electric Power Co. 6½ Bonds	483,000	.....	.....	483,000
	Capital Electric Light, Motor & Gas Co. 6¼ Bonds	16,000	.....	.....	16,000
	Interstate Light & Power Co. 5% Bonds	35,000	.....	.....	35,000
	<i>Bonds covering all of the properties:</i> First and Refunding Mortgage 6% Bonds	2,474,000	.....	2,474,000	
	First and Refunding Mortgage 5% Bonds	738,000	718,000	20,000	
	Consolidated First and Refunding Mortgage 6% Bonds	1,020,000	854,000	166,000 for stock.	
	<i>Notes:</i> Notes secured by \$500,000 face value Consolidated First and Refund- ing Mortgage 6% Bonds	250,000	250,000		

Idaho Railway Light & Power Co.	<i>Prior Lien Bonds covering portions of properties only:</i> Boise and Interurban Railway Com- pany 5% Bonds	1,068,000	.....	1,068,000
		389,000	.....	389,000
	Boise Railway Company 5% Bonds..			
	<i>Bonds covering all the properties:</i>			
	First and Refunding Mortgage 5% Bonds	4,500,000	.....	4,500,000
	Adjustment Mortgage 5% Bonds...		.....	2,494,000
	5% Income Bonds convertible into First and Refunding Bonds at end of five years	2,000,000	.....	2,000,000

Exhibit C.

New York, May 1, 1913.

To the Holders of

First and Refunding Mortgage Bonds

Consolidated First and Refunding Mortgage
Bonds

Preferred Stock

Common Stock

of Idaho-Oregon Light & Power Co.

Since sending the First Mortgage bondholders its circular letter of March 26th last, the Committee has received from various parties in interest and considered a great variety of suggestions and proposals. During the past two weeks, at the invitation of the Committee, its representatives and those of other parties in interest, including those who have sold the Idaho-Oregon Company's bonds, have conferred almost daily regarding the matter; and, in connection with their consideration thereof, all desired facts bearing upon the situation have been furnished from the records of the Idaho-Oregon Company and of the Railway Company. As a result of such conferences another plan has been prepared, a copy of which is herewith enclosed. As you will observe, the plan now includes the holders of Consolidated First and Refunding Mortgage Six Per Cent. Bonds, as well as all preferred and common stockholders of the Idaho-Oregon Company. Its substantial provisions are as follows:

(1) The property, rights and franchises of the Idaho-Oregon Company to be transferred to the Railway Company free of all liens except those underlying the first mortgage.

(2) Instead, as originally proposed, of an Adjustment Bond paying interest only as earned, the Railway Company will create a second mortgage covering all of its property, rights and franchises and all of those now held by the Idaho-Oregon Company, to secure bonds which will be issued in two series, to be designated respectively "A" and "B".

Series A bonds will be issued to the amount of \$3,212,000 and will bear interest at the fixed rate of 2% during the first, 3% during the second, 4% during the third year and 5% thereafter. In addition, they are to be convertible into First Mortgage Bonds of the Railway Company, par for par, after five years, in amounts of not less than \$500,000, under the conditions more particularly set forth in the said amended plan.

Series B bonds will be issued to the amount of \$1,448,000, the lien of which will be inferior to that of the Series A bonds. They will be entitled to no interest during the first three years after their issue unless and to the extent that the same shall be earned up to 5%. Thereafter, they are to bear interest at the rate of 5% per annum, and, after all Series A bonds are entitled to be converted, the Series B bonds are to be convertible into First Mortgage bonds of the Railway Company upon the same conditions as to

earnings, etc., as are provided with respect to Series A bonds.

(3) Each holder of First Mortgage Bonds of the Idaho-Oregon Company is to receive an equivalent amount of Series A Second Mortgage Bonds of the Railway Company and voting trust certificates for 35% of the face amount thereof in common stock of the Railway Company.

(4) Each holder of Consolidated First and Refunding Bonds of the Idaho-Oregon Company is to receive an equivalent amount of the Series B Mortgage Bonds.

(5) Holders of \$2,000,000 of the Railway Company's First Mortgage Bonds, which, under the original plan, were to be exchanged for Income Bonds convertible into First Mortgage Bonds, receive Series A Second Mortgage Bonds for \$718,000 thereof and Series B Second Mortgage Bonds for \$1,282,000 thereof.

(6) Preferred and common stock of the Railway Company to be respectively exchanged for voting trust certificates representing equivalent amounts of preferred and common stock of the Idaho-Oregon Company.

As it is absolutely essential that the steps necessary to carry out the amended plan be taken at the earliest possible moment, all who are desirous of participating therein must deposit their bonds and stock on or before the 15th day of May, 1913, after which time the Committee reserves the right to re-

fuse further deposits or to accept them only upon such terms as it may prescribe.

N. D. Putnam, Jr.,

Secretary.

Samuel L. Fuller, Chairman.

Charles E. Bockus,

L. B. Franklin,

William Mainland,

Homer W. McCoy,

Daniel E. Pomeroy,

Stacy C. Richmond,

Committee.

IN EQUITY—NO. 444.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO,

Plaintiff,

v.

IDAHO OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY and F. N. B.
CLOSE,

Defendants,

and

A. W. PRIEST, et al.,

Interveners.

ANSWER OF IDAHO RAILWAY, LIGHT & POW-
COMPANY TO BILL IN INTERVENTION.

NOW COMES the Idaho Railway, Light & Power Company, a corporation of the State of Maine, of the City of Portland, County of Cumberland, in the

State of Maine, pursuant to the order of the Court in the above entitled cause, dated September 19th, 1913, by which said Idaho Railway, Light & Power Company, which will hereafter for convenience be called the Railway Company, is required to answer the allegations of the bill in intervention respecting 718 bonds and now at all times hereafter saving to itself any and all manner or benefits of exceptions, or otherwise, that may be taken to the many errors, uncertainties and imperfections in the said bill in intervention and to all or some of the subject matter named or set forth in said bill, by way of answer to said bill in intervention, or to so much of said bill as the said Railway Company is advised it is material or necessary for it to answer, and particularly and only such matter as the said Railway Company is ordered by this Court to answer by the order dated as aforesaid, and so answering the said Railway Company respectfully shows to this Honorable Court and alleges:

FIRST

The said Railway Company moves to dismiss the said bill in intervention and all the allegations thereof affecting the said Railway Company and particularly moves to dismiss said bill in intervention in so far as the same affects or refers to the said 718 bonds as to which the Railway Company is required to answer, on the ground that said bill in intervention and the said allegations as to said bonds do not state facts sufficient to entitle the interveners to any

relief as against the said Railway Company, and do not state any facts which, if true, would afford any basis for cancelling said bonds or requiring the Railway Company to surrender the same.

SECOND

Reserving to itself all benefit of the foregoing motion to dismiss, and protesting that on account of the matters therein stated the Railway Company should not be further required to answer the allegations of said bill in intervention, the said Railway Company in answer to said bill to the extent and only to the extent hereinbefore stated, says:

1. In answer to the allegations of paragraph twelve of said bill in intervention and all other allegations or paragraphs thereof relating to the exchange of \$718,000.00 face and par value of consolidated or second mortgage bonds (hereinafter called consolidated bonds) of the defendant Idaho-Oregon Light & Power Company (hereinafter called the Power Company) for an equivalent or like amount of refunding or first mortgage bonds (hereinafter called refunding bonds) of said defendant Power Company, the Railway Company denies that it was in possession of, or that it claimed ownership of, said consolidated bonds in the early part of 1913. Denies that it at any time demanded of the Power Company, that it received back said bonds, and delivered to it, the Railway Company, an equivalent amount of refunding bonds, or that said defendant Power Company necessarily

or at all acceded to such demand. Denies that said consolidated bonds had no market value; denies that they were to all or any intents or purposes worthless; denies that any exchange of said bonds was without consideration; denies that any such exchange of bonds was, either as to defendant Power Company or as to the interveners, wrongful or fraudulent; denies that said bonds were neither issued nor outstanding nor valid obligations of the defendant Power Company; denies that said bonds should be called in or cancelled.

The Railway Company answering and in explanation of the facts charged in said bill in intervention, alleges:

That on and prior to September 25th, 1912, the defendant Power Company was in need of \$250,000.00 for its general corporate purposes and legitimate capital expenditures; that on and prior to said date, the defendant Power Company applied to the Railway Company for a loan of \$250,000.00 in cash; that the Railway Company was at the time of such application the owner by purchase of consolidated bonds of the Power Company of the face and par value of about \$1,500,000, which said bonds bore interest at the rate of six per cent per annum but were inferior in lien to the said refunding bonds, which said bonds bore interest at the rate of five per cent per annum; that the Power Company represented at that time that it had certified and in its treasury as free assets, refunding bonds to the

amount of \$305,000 and that it was entitled under the terms of its trust deed to a further issue of refunding bonds to reimburse it for expenditures made to an amount in excess of \$500,000. That the Railway Company stipulated as a condition of making said loan to the Power Company that the Power Company should exchange its said first or refunding mortgage bonds then in its treasury or to which it should be entitled, to the extent of \$500,000.00 for a like amount of consolidated bonds held by the Railway Company, and that it should further secure the Railway Company for loans made by it to the extent of \$250,000.00 by a pledge of said refunding bonds in the ratio of two dollars in bonds for one dollar of loan; that these terms were accepted by the Power Company and an agreement for such exchange was made, a copy of which agreement is attached as Exhibit B to the answer of the defendant Power Company, which said exhibit is hereby referred to and by reference made a part hereof. That the Power Company thereupon procured the certification of the bonds to which it was entitled from the plaintiff herein as its Trustee, as hereinbefore stated, and refunding bonds to the extent of about \$440,000 were exchanged by the Power Company for consolidated bonds held by the Railway Company on or about December 27th, 1912, said bonds having been theretofore delivered by the Power Company to the Railway Company as collateral and the Railway Company accepted consolidated bonds as said collateral in lieu of said refunding bonds.

2. That on or about the date of said last exchange, to-wit: December 27th, 1912, the Power Company applied to the Railway Company to assist it in a settlement of a controversy with the Bates & Rogers Construction Company, an Illinois corporation, hereinafter called Construction Company, and the Railway Company to assist the Power Company pursuant to said application agreed to deliver fifty shares of its preferred stock and one hundred shares of its common stock to the Construction Company and further agreed to purchase from the construction Company on demand within a specified period \$25,000 face and par value of the Power Company's consolidated bonds at eighty per centum of the face and par value thereof and interest accrued and unpaid thereon, which said bonds were then delivered by the Power Company to the Construction Company as part of said settlement of controversy. That as consideration for said agreement, on the part of the Railway Company and of its assistance in effecting said settlement, the Power Company agreed to exchange with the Railway Company additional refunding bonds not to exceed \$500,000 face and par value thereof for a like amount of consolidated bonds still held by the Railway Company. A copy of said agreement is annexed to the answer of the defendant Power Company marked Exhibit C and is referred to and by way of reference made part hereof.

3. That pursuant to said agreements of September 25th and December 27th, 1912, the Railway Company duly performed all the conditions of said

agreements by it to be performed and loaned to the Power Company \$250,000 in cash and delivered to the Power Company from time to time, the last delivery being made in January 1913, its consolidated six per cent second mortgage bonds for refunding five per cent first mortgage bonds, which the Power Company delivered to the Railway Company and the Railway Company likewise accepted from the Power Company as collateral for its said loan consolidated bonds in lieu of said refunding bonds to which it was entitled under its said agreement of September 25th 1912. That said agreements, and each of them, have been duly performed and executed and the Railway Company claims to own and does own the said \$718,000 face and par value of first and refunding bonds of the Power Company and is entitled to participate in the distribution of the proceeds of any sale in this cause to the extent thereof.

4. This Railway Company does not admit any of the allegations of the said bill in intervention not herein denied or referred to, but limits its answer to the matters herein stated on the ground and for the reason solely that it is not required but is expressly excused from answering the same by said order of September 19th 1913, pursuant to which this said answer is made.

WHEREFORE, The Railway Company prays that its said ownership of said bonds be confirmed and that the bill in intervention be dismissed as to it, and that said Railway Company be dismissed from

this cause save and only as distributee of the proceeds of sale.

IDAHO RAILWAY, LIGHT & POWER COMPANY,

By Alfred A. Fraser.
ALFRED A. FRASER,
Solicitor for Idaho Railway,
Light & Power Company,
Residing at Boise, Idaho.

(Endorsed) : Filed October 1913. A. L. Richardson, Clerk.

IN EQUITY—NO. 444.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO,

Plaintiff,

v.

IDAHO-OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY and F. N. B.
CLOSE,

Defendants,

A. W. PRIEST, et al.,

Intervenors.

ANSWER TO BILL IN INTERVENTION OF DEFENDANT IDAHO-OREGON LIGHT & POWER COMPANY.

AND NOW COMES The defendant, Idaho-Oregon Light & Power Company, a corporation of the State of Maine and a resident of the City of Port-

land, County of Cumberland, in the State of Maine, and now and at all times hereafter saving to itself any and all manner or benefit of exceptions or otherwise that may be taken to the many errors, uncertainties and imperfections in the bill of intervention of A. W. Priest, et al., herein, and to all or some of the subject matter named and set forth in said bill of intervention, for answer to said bill of intervention, or so much thereof as these defendants are advised it is material and necessary for them to answer, and answering particularly and only such matters as the said defendant is ordered by this Court to answer, by the order made and entered by this Court on the 19th day of September, 1913, and, so answering, respectfully shows to this Honorable Court and alleges:

I.

In answer to the allegations of paragraph XII of the bill of intervention and all other paragraphs or allegations of said bill relating to the exchange of \$718,000.00, face and par value, of Consolidated Bonds of the defendant Power Company for an equivalent or like amount of First & Refunding Bonds of said defendant Power Company, being the bonds involved in this suit, this defendant denies that the Railway Company—meaning the Idaho Railway, Light & Power Company—was in possession of or claiming ownership of said Consolidated Bonds in the early part of 1913; denies that it then, or at any time, demanded of the Power Company that it receive back said Consolidated Bonds and de-

liver to the Railway Company an equal amount of First Mortgage Bonds, upon which foreclosure is sought, or that this defendant necessarily acceded to said demand or delivered to the Railway Company said \$718,000.00 of said First Mortgage Bonds after the said Railway Company had collected the November, 1912, interest on said Consolidated Bonds; denies that said Consolidated Bonds had no market value; denies that said Consolidated Bonds were, to all intents and purposes, worthless; denies that said exchange of bonds was without consideration; denies that the same was, as to the Power Company or the interveners, either wrongful or fraudulent; denies that said bonds were not either issued or outstanding or valid obligations of the Power Company; denies that the same should be called in or cancelled.

This defendant alleges, in this connection, that the true facts in connection with said transaction of the exchange of said bonds are as follows: That, on and prior to September 25, 1912, the defendant Power Company was in need of \$250,000.00 in cash to make necessary extensions and improvements of its power system and for its general capital expenditures; that on and prior to said date, Kissel, Kinicutt & Company—mentioned in the bill in intervention—were under agreement to purchase from the Power Company \$175,000.00, face and par value, of the defendant Power Company's Consolidated Bonds at eighty per centum (80%) of said face and par value, amounting to \$140,000.00 in cash, and no more; that, on or about September 25, 1912, the said

Kissel, Kinnicutt & Company proposed, in consideration of a release from the obligation to purchase the balance of said bonds and to furnish \$140,000.00 in cash for such purchase, to procure from the Railway Company—meaning the Idaho Railway, Light & Power Company—a loan of \$250,000.00 in cash, on terms and conditions prescribed by the Railway Company, among others that this defendant Power Company should give the Railway Company, in exchange for a like number of the said Consolidated or Second Mortgage Bonds, of which the Railway Company was then the owner, First or Refunding Mortgage Bonds of the Power Company to the amount of \$500,000.00 and should secure the Railway Company for loans made by a pledge of said First and Refunding Mortgage Bonds in the ratio of two dollars in bonds for one dollar of loan; and the said proposal of Kissel, Kinnicutt & Company was accepted by this defendant, the Power Company, in good faith and in the belief that it was to the interest of this company that the said exchange be made; that, among other benefits accruing to the Power Company, was the reduction in the rate of interest from six per centum (6%) on said Consolidated or Second Mortgage Bonds to five per centum (5%) on said First or Refunding Mortgage Bonds and the obtainment by the Power Company of a substantial amount of new capital, sufficient for its then present needs. Upon the acceptance of said proposal, a contract was entered into between the Railway Company and the Power Company for the said loan and

exchange of bonds; and, pursuant to said contract, First and Refunding Mortgage Bonds to the extent of \$440,000.00 were exchanged by the Power Company with the Railway Company, on or about December 27, 1912, said bonds having been theretofore delivered to the Railway Company by the Power Company as collateral, and Consolidated or Second Mortgage Bonds were accepted by the Railway Company as said collateral in lieu of said First and Refunding Mortgage Bonds; and, on or about the same date, to-wit: December 27, 1912, the defendant Power Company, having become involved in a controversy between itself and Bates & Rogers Construction Company, an Illinois corporation, respecting the termination of a construction contract between said companies, entered into an agreement for the final settlement of said controversy which provided, among other things, that the Power Company should deliver to the Construction Company fifty (50) shares of the Preferred Stock and one hundred (100) shares of the Common Stock of the Railway Company, together with the obligation of the Railway Company to purchase from the Construction Company at any time between May 29 and July 29, 1914, \$25,000.00, face and par value, of the Power Company's Consolidated or Second Mortgage Bonds at eighty per centum (80%) of the face value thereof and interest accrued and unpaid thereon; and, in order to carry out said agreement with said Bates & Rogers Construction Company, entered into a contract, of the same date, with the Railway

Company by which the Railway Company agreed to deliver to the said Bates & Rogers Construction Company fifty (50) shares of its Preferred Stock and one hundred (100) shares of its Common Stock, and agreed to purchase from the Construction Company the Power Company's bonds, as provided in said agreement between said Bates & Rogers Construction Company and this defendant Power Company, and, in consideration thereof, the Power Company agreed to deliver to the Railway Company not to exceed \$500,000.00, face value, of the Power Company's First and Refunding Mortgage Bonds for a like number of the Power Company's Consolidated or Second Mortgage Bonds then held by the Railway Company; that the Railway Company and the Power Company have each duly performed all the obligations and conditions of the said contracts by them to be performed, and the Railway Company has loaned to the Power Company the said \$250,000.00 in cash and has delivered one hundred (100) shares of its Common Stock and fifty (50) shares of its Preferred Stock to said Bates & Rogers Construction Company, and has, likewise, agreed to purchase from the Bates & Rogers Construction Company the said bonds delivered by the Power Company to it, as hereinbefore stated, and has delivered to the Power Company Consolidated or Second Mortgage Bonds held by the Railway Company to the face or par value of \$718,000.00, and the Power Company has delivered to the Railway Company, in exchange therefor, its First or Refunding Mortgage Bonds to

the face or par value of \$718,000.00; and that said contracts have been completely executed and carried out. Copies of the said contract between Kissel, Kinicutt & Company and the Power Company and of the proposal of September 25, 1912, and of the contract of December 17, 1912, between the Power Company and the Railway Company are hereto attached, marked respectively Exhibits "A," "B" and "C" and, by reference, made a part hereof.

II.

In answer to the allegation of paragraph XIII of the said bill of intervention, and all other allegations of said bill relating to the certification and delivery of \$107,000.00, face and par value, of the First and Refunding Mortgage Bonds, which this defendant is required to answer by paragraph II of the said order of Court, this defendant admits that said bonds were delivered on or about April 10, 1913, but this defendant alleges that said bonds were requisitioned on January 10, 1913, said requisition being shown in Exhibit "C"—27 on file in this cause and for purposes therein stated, being valid corporate purposes of the defendant Power Company for which it was entitled to receive bonds from the Trustee under the terms and conditions of said First and Refunding Mortgage to the plaintiff herein; that said requisition and the necessary affidavits were forwarded to the plaintiff, as Trustee, under said mortgage, immediately after January 10, 1913, the exact date being unknown, but during the month of January, 1913; that said requisition and accom-

panying affidavits were received by said Trustee during said month of January, 1913, and, under and by virtue of the terms of said mortgage, this defendant Power Company became immediately entitled to said bonds; that the Trustee withheld certification and delivery of said bonds until it had procured an independent report on the validity and propriety of said expenditures, which report it caused to be made by H. M. Byllesby & Company, operating engineers of power and other like companies; that said report required a personal investigation by the persons making the same and was not filed with the plaintiff, as such Trustee, until the latter part of March, 1913; that this defendant is informed and believes that the opinion of counsel to the plaintiff, as Trustee, approving the said requisition, was delivered to said plaintiff on or about March 30, 1913; that this defendant does not know why the bonds were not delivered upon said last mentioned date; that, since receiving said bonds on April 10, 1913, the said defendant Power Company has used said bonds as collateral to secure loans advanced by the Railway Company from time to time, and said bonds are now held by the Railway Company to secure outstanding indebtedness of the Power Company to the Railway Company otherwise unsecured.

III.

In answer to the allegations of paragraph XIV of of the bill in intervention, relating to \$520,000.00 First Mortgage Bonds mentioned in said paragraph

and referred to in paragraph II of the Court's order, this defendant alleges that the said \$520,000.00 First Mortgage Bonds referred to are a part of the same bonds mentioned in the preceding paragraphs of this answer, to-wit: the \$825,000.00 bonds delivered to the Railway Company, and that the facts in connection with such delivery are as hereinbefore stated; that no First Mortgage Bonds were requisitioned or delivered by the plaintiff, as Trustee, to the defendant Power Company subsequent to October 17, 1910, until December 11, 1912, when bonds number 3342 to number 3754, inclusive, were delivered to the Power Company and by it to the Railway Company in accordance with the proceedings had on September 25, 1912, hereinbefore referred to; and on or about April 10, 1913, bonds numbered 3755 to 3861 were certified, pursuant to the proceedings and under the conditions stated in the preceding paragraph of this answer; that the purposes for which said bonds were requisitioned and certified, and the expenditures on which said bonds are based, are set forth in the respective requisitions constituting a part of Exhibit "C" on file herein, and itemized statements of said expenditures are hereto attached, marked as Exhibit "D," and made a part hereof; and that said purposes are purposes for which bonds could lawfully be issued.

IV.

With respect to the allegations of the said bill in intervention referred to in paragraph IV of the Court's order relating to the method and manner of

payment of interest due April 1, 1913, this defendant denies that said interest was paid and denies further that any of the said interest, if paid, was paid by the defendant Power Company or with its knowledge, and alleges, on information and belief that the so-called New York Committee, mentioned in the bill intervention, loaned, on the security of bonds deposited with it under its said deposit agreement of May 1, 1913, the interest accruing on said bonds on said date, but that said advancement was purely in the nature of a loan and was not a payment of said interest. The facts in connection with said advancement of interest more fully appear from the deposit agreement, a copy of which is on file as an exhibit herein, and to which reference is hereby made.

V.

This defendant does not admit any of the allegations of the said bill in intervention, except as herein stated, and neglects to answer said allegations solely because of the Court's order limiting the scope of the bill to the matters herein referred to.

WHEREFORE, This defendant, having answered so much of the bill in intervention as it is advised is material and proper for it to answer, prays that the said interveners take nothing by said bill and that the said bill be dismissed as against this defendant.

IDAHO-OREGON LIGHT & POWER COMPANY,

By John F. MacLane,
Solicitor for said Defendant.

Exhibit "A"

AGREEMENT made this 25th day of September, 1912, between KISSEL, KINNICUTT & COMPANY, hereinafter called the "Bankers," parties of the first part, IDAHO-OREGON LIGHT & POWER COMPANY, a Maine corporation, hereinafter called the "Oregon Company," party of the second part, and W. AND S. MAINLAND, a firm transacting business in the City of Oshkosh, Wisconsin, and composed of Messrs. William and Sinclair Mainland, hereinafter called the "Mainlands," parties of the third part.

WHEREAS, under date of September 19, 1911, the parties hereto entered into a contract in writing whereby, among other things, the Bankers obligated themselves to purchase of the Oregon Company one million five hundred thousand dollars (\$1,500,000) face value of the Oregon Company's Consolidated First and Refunding Mortgage Six Per Centum (6%) Gold Bonds at eighty per centum (80%) of the face value thereof, and

WHEREAS, pursuant to the terms of said contract, the Bankers have purchased to the present date one million three hundred and twenty-five thousand dollars (\$1,325,000) face value of said bonds, leaving to be purchased the further amount of one hundred and seventy-five thousand dollars (\$175,000) face value thereof, which purchase at the said contract price would net the Oregon Company the sum of one hundred and forty thousand dollars (\$140,000) in cash and no more, and

WHEREAS, the Oregon Company will require during the next six months for its corporate purposes the sum of two hundred and fifty thousand dollars (\$250,000), and

WHEREAS, although the Bankers are ready and willing to purchase at the said contract price said one hundred and seventy-five thousand dollars (\$175,000) face value of said bonds, but are unwilling to purchase any further amount of said bonds, and

WHEREAS, the Bankers have offered to procure for the Oregon Company upon the terms hereinafter expressed, the said sum of two hundred and fifty thousand dollars (\$250,000) in consideration of the Bankers being released from their obligation to purchase said one hundred and seventy-five thousand dollars (\$175,000) face value of said bonds, and

WHEREAS, said offer has been accepted by the Oregon Company,

NOW, THEREFORE, in consideration of the premises and the mutual covenants hereinafter expressed, it is agreed by the parties hereto as follows:

First: The Bankers agree to procure Idaho Railway, Light & Power Company, a Maine corporation, hereinafter called the Railway Company, to loan to the Oregon Company the sum of two hundred and fifty thousand dollars (\$250,000), or any part thereof, with interest thereon at the rate of six per centum (6%) per annum, of which one hundred thousand dollars (\$100,000) shall be loaned forthwith and the balance thereof whenever requested by the Oregon Company (such request, however, to be made within

six months of the date hereof and if not made within such period the loan not so called for to cease and determine) each loan, when made, to be for a period of six (6) months from the making thereof, with an option to the Oregon Company to renew said loan for the further period of six (6) months at same rate to be secured by an amount of the Oregon Company's said First and Refunding Mortgage Gold Bonds, bearing interest at the rate of five per centum (5%) per annum, equal at their face value to twice the amount of such loan, and to be further secured by a promissory note in form as follows:

"New York, 19.

"Idaho-Oregon Light & Power Company, a Maine corporation, promises to pay to Idaho Railway, Light & Power Company, at its office in the City of New York, on.....,dollars.....for value received, with interest thereon at the rate of six (6) per centum per annum, payable on having deposited with said Idaho Railway, Light & Power Company as collateral security face value of Idaho-Oregon Light & Power Company's First & Refunding Mortgage Five Per Centum Gold Bonds, secured by the Mortgage and Deed of Trust made by said Company to State Bank of Chicago and dated April 1, 1907;

"With authority to sell such security at any broker's board, or at public or private sale, or otherwise at the option of Idaho-Oregon Light & Power Company, on the non-performance of promise, and, upon such sale, Idaho Railway, Light & Power Company may purchase the whole or any part of such

securities, discharged from any right of redemption, retaining claim against Idaho-Oregon Light & Power Company for any deficiency; any surplus arising from said sale, after paying in full the amount due on this loan, both principal and interest, together with the expenses of the sale in question, to be paid to Idaho-Oregon Light & Power Company.

“The principal of this note shall become due and payable

“(a) Upon default being made in the due and punctual payment of any installment of interest thereon; or

“(b) Upon default being made in the due and punctual payment of any installment of interest upon any of the Idaho-Oregon Light & Power Company’s bonds; or

“(c) Upon any Court proceedings being instituted against Idaho-Oregon Light & Power Company for the purpose of appointing a receiver or otherwise sequestrating its assets for the benefit of its creditors.

IDAHO-OREGON LIGHT & POWER COMPANY,

By.....
President.

.....
Secretary.

(Corporate Seal)

Second: As further consideration moving from the Oregon Company to the Railway Company for the making of this loan, the Oregon Company shall on demand of the Railway Company deliver to the

Railway Company such amount not to exceed \$500,000 face value of its said First and Refunding Five Per Centum Gold Bonds as the Railway Company may from time to time demand, upon receiving in exchange from the Railway Company an equivalent amount of the Oregon Company's Consolidated First and Refunding Mortgage Six Per Centum (6%) Gold Bonds, now owned by the Railway Company, provided, however, that there are or may be made available to the Oregon Company a sufficient amount of its said First and Refunding Five Per Centum Gold Bonds to satisfy such demand, and that First and Refunding Bonds to the amount of said demand are available to the Oregon Company and not appropriated for other purposes.

IN WITNESS WHEREOF, the party of the second part has caused these presents to be executed in its corporate name by its President thereunto duly authorized, and its corporate seal to be hereto annexed, and the parties of the first and third parts have hereunto set their respective hands and seals as of the day and year first above written.

IDAHO-OREGON LIGHT & POWER COMPANY,

By Stacy C. Richmond, Vice-President;
W. AND S. MAINLAND,

By William Mainland,
a member of the firm;
KISSEL, KINNICUTT & COMPANY,

By S. L. Fuller, a member of the firm.

In the Presence of:

John T. Coit,
Forsyth Wickes.

Exhibit "B."

Proposal and acceptance, excerpted from minutes of meeting of Board of Directors of Idaho-Oregon Light & Power Company, held at New York City on September 25, 1912, at 3:30 P. M.

"The Chairman thereupon presented and read to the meeting a proposal from Idaho Railway, Light & Power Company to advance to this company the sum of two hundred and fifty thousand dollars (\$250,000), which proposal was as follows:

"Dear Sirs:

"Idaho Railway, Light & Power Company proposes to lend to Idaho-Oregon Light & Power Company, in such installments as the latter may request (such request, however, to be made within six months of the date when this proposal is accepted and if not made within such period, the obligation of Idaho Railway, Light & Power Company to make the balance of the loan not so called for to cease and determine), the whole or any part of the sum of \$250,000 provided Idaho-Oregon Light & Power Company will execute notes for such sums as are advanced bearing interest at 6% per annum, due six months from the date of execution thereof, and will pledge, as security therefor its First and Refunding Mortgage 5% Bonds to the extent of double the face value of said notes; the notes and pledge agreement thereunder to be in the following form:

"New York, 19

"Idaho-Oregon Light & Power Company, a Maine corporation, promises to pay to Idaho Railway, Light & Power Company, at its office in the City of New

York, on.....,dollars (.....)for value received, with interest thereon at the rate of six (6%) per centum per annum, payable on
..... having deposited with said Idaho Railway, Light & Power Company as collateral security face value of Idaho-Oregon Light & Power Company's First & Refunding Mortgage five per cent. Gold Bonds, secured by the Mortgage and Deed of Trust made by said company to State Bank of Chicago and dated April 1, 1907;

“With authority to sell such security at any broker's board, or at public or private sale, or otherwise, at the option of Idaho-Oregon Light & Power Company, on the non-performance of promise, and, upon such sale, Idaho Railway, Light & Power Company may purchase the whole or any part of such securities, discharged from any right of redemption, retaining claim against Idaho-Oregon Light & Power Company for any deficiency; any surplus arising from said sale, after paying in full the amount due on his loan, both principal and interest, together with the expenses of the sale in question, to be paid to Idaho-Oregon Light & Power Company.

“The principal of this note shall become due and payable

“(a) Upon default being made in the due and punctual payment of any installment of interest thereon; or

“(b) Upon default being made in the due and punctual payment of any installment of interest upon any of the Idaho-Oregon Light & Power Company's bonds; or

“(c) Upon any Court proceedings being instituted against Idaho-Oregon Light & Power Company for the purpose of appointing a receiver or otherwise sequestrating its assets for the benefit of its creditors.

“IDAHO-OREGON LIGHT & POWER COMPANY,

By.....

(Corporate Seal)

President.

.....
Secretary.

“And

“Provided further that, as a part of the same transaction and as a part of the consideration for such loan, Idaho-Oregon Light & Power Company will accept in exchange, as the same may be offered for exchange by Idaho Railway, Light & Power Company, dollar for dollar, and bond for bond, an amount not to exceed \$500,000 face value of Idaho-Oregon Light & Power Company's Consolidated First and Refunding Mortgage 6% Gold Bonds now held by Idaho Railway Light & Power Company for an equivalent amount of Idaho-Oregon Light & Power Company First and Refunding 5% Bonds, provided bonds to the amount of said demand are in the treasury or subject to be placed in the treasury of Idaho-Oregon Light & Power Company.

“Yours truly,

“IDAHO RAILWAY, LIGHT & POWER COMPANY,

By William Mainland,

President.

“After a discussion of the proposal,

“On motion, duly made and seconded, the following resolution was unanimously adopted:

“RESOLVED That the offer of Idaho Railway, Light & Power Company so presented to this meeting, be, and the same hereby is, accepted, and that the proper officers of this company be, and they hereby are, authorized and directed to do all such things as may be requisite and necessary to close said loan.”

Exhibit “C.”

AGREEMENT made this 17th day of December, 1912, between IDAHO-OREGON LIGHT & POWER COMPANY, a Maine corporation, herein termed the “Power Company,” of the first part, and IDAHO RAILWAY, LIGHT & POWER COMPANY, also a Maine corporation, herein termed the “Railway Company,” of the second part:

WHEREAS a controversy existed between the Power Company and Bates & Rogers Construction Company, an Illinois corporation, herein termed the “Construction Company,” respecting an agreement between said Companies, for the construction of a hydro-electric power plant at Ox Bow bend on the Snake River in the State of Idaho for the Power Company; and

WHEREAS a settlement of said controversy has been agreed upon, which provides, among other

things, that the Power Company procure and deliver to the Construction Company fifty (50) shares of the preferred stock and one hundred shares (100) of the common stock of the Railway Company to purchase from the Construction Company at any time between May 29th and July 29th, 1914, \$25,000, face value of the Power Company's Consolidated First and Refunding Mortgage Six Per Centum Gold Bonds at 80% of the face value thereof and interest accrued and unpaid thereon; and

WHEREAS the Power Company has requested the Railway Company to issue and deliver to the Construction Company said stock and obligate itself to the Construction Company for the purchase of said bonds upon the terms aforesaid; and

WHEREAS the Railway Company has consented to deliver said stock and execute said agreement, all upon the terms and conditions hereinafter expressed which are acceptable to the Power Company;

NOW, THEREFORE, in consideration of the premises and the mutual covenants hereinafter expressed, it is agreed by the parties hereto as follows:

First: Upon demand of the Power Company the Railway Company shall deliver to the Construction Company fifty (50) shares of its preferred stock, and one hundred (100) shares of its common stock made out as the Construction Company may request, and shall execute and exchange with the Construction Company the agreement appearing as Exhibit "A" hereto.

Second: The Power Company shall upon demand of Railway Company deliver to the Railway Company such amount not to exceed \$500,000 face value of the Power Company's First and Refunding Mortgage Five Per Centum Gold Bonds secured by the mortgage and deed of trust made by the Power Company to State Bank of Chicago, and dated April 1, 1907, (said amount of said bonds to be in excess of the amount of said bonds exchangeable under the terms of the agreement between the parties hereto made September 25, 1912), as the Railway Company may from time to time demand upon receiving in exchange from the Railway Company an amount of the Power Company's Consolidated First & Refunding Mortgage Six Per Centum Gold Bonds secured by the mortgage and deed of trust made by the Power Company to Windsor Trust Company of New York and Marmaduke Tilden, as Trustees, dated November 1, 1910, now owned or which may hereafter be acquired by the Railway Company, provided, however, that there are or may be made available to the Power Company a sufficient amount of its said First and Refunding Five Per Centum Gold Bonds to satisfy such demand.

IN WITNESS WHEREOF the parties hereto have caused these presents to be executed in their corporate name by their respective Presidents thereunto duly authorized, and their respective corporate seals to be hereto attached and attested by their re-

spective Secretaries, all as of the day and year first above written.

(Seal)

IDAHO-OREGON LIGHT & POWER COMPANY,
In the Presence of:

G. E. Hendee

By William Mainland,

President.

IDAHO RAILWAY, LIGHT & POWER COM-
PANY,

G. E. Hendee

By William Mainland,

(Seal)

President.

Exhibit "D."

	July 1, 1910 to Dec. 31, 1911	Jan. 1, 1912 to July 31, 1912	TOTAL
Power Plant Improvements (excl. Ox Bow)	\$ 17,397.77	\$ 485.30	\$ 17,883.07
Transmission Lines	46,019.04	47,535.87	93,554.91
Substations	23,135.02	30,900.63	54,035.65
Distribution Lines, O. H.	91,051.39	46,893.38	137,944.77
Underground System .....	.....	30,299.25	30,299.25
Transformers	28,313.39	11,990.07	40,303.46
Meters	26,327.65	7,034.01	33,361.66
Arc Lamps	3,439.52	2,278.76	5,718.28
Office Furniture & Fix.	3,514.08	2,132.50	5,646.58
Other Equipment	4,035.59	1,205.87	5,241.46
Engineering & Gen. Exp.	1,691.70	8,085.09	9,776.79
Ontario Water Works	3,641.18	1,437.38	5,078.56
Development	10,826.10	.....	10,826.10
Salmon River Dev.	8,494.22	.....	8,494.22
Weiser Development	48,222.81	.....	48,222.81
Total	\$316,909.45	\$190,278.11	\$507,187.56

Exhibit.

POWER PLANT IMPROVEMENTS.

Items	Amount
Horseshoe Bend Engineering & Superintendence	\$ 23.40
Horseshoe Bend Land & Buildings	26.55
Horseshoe Bend Dams, Canals & Pipe Lines	1,295.67
Horseshoe Bend Electrical Apparatus	79.09
South Boise Dams, Canals & Pipe Lines	81.50
Total	\$1,506.21

TRANSMISSION LINES.

Items	Eng. & Sup.	Lab. & Mat.	TOTAL
Boise	\$ 0	\$ 32.25	\$ 32.25
Boise-Meridian	0	538.84	538.84
Meridian-Nampa	0	254.62	254.62
Emmett-Weiser	0	5.00	5.00
Ontario-Nyssa	0	58.15	58.15
Nyssa-Parma	32.00	10,087.89	10,119.89
Nyssa-Kingman Colony	0	15.20	15.20
Gypsum-Mormon Basin	75.05	27,242.52	27,317.57
Undistributed Items	0	21.51	21.51
Total	107.05	38,255.98	38,363.03

SUBSTATIONS.

Location	Land & Buildings	Electrical Apparatus	TOTAL
Boise	\$ 564.02	\$ 4,851.31	\$ 5,415.33
Meridian	0	56.24	56.24
Emmett .....	.50	0	.50
Nyssa	65.29	95.69	160.98
Ontario	0	.35	.35
Weiser	29.15	4.65	33.80
Gypsum	3,169.80	3,497.05	6,666.85
Total	3,828.76	8,505.29	12,334.05
Credit	2.60	0	2.60
Total	3,826.16	8,505.29	12,331.45

DISTRIBUTION SYSTEM.

Districts	Eng. & Sup.	Overhead System	Underground System	TOTAL
Boise	\$70.00	\$ 8,043.24	\$40,393.97	\$48,507.21
Meridian		60.70		60.70
Emmett		271.27		271.27
New Plymouth		273.14		273.14
Parma		58.67		58.67
Nyssa		151.76		151.76
Ontario		505.35		505.35
Payette		1,461.08		1,461.08
Weiser		281.18		281.18
Huntington	5.60	7,336.44		7,342.04
Gypsum		35.50		35.50
Total	75.60	18,478.33	40,393.97	58,947.90

TRANSFORMERS, METERS & ARC LAMPS.

Districts	Transformers	Meters	Arc Lamps
Boise	\$1,607.62	\$1,183.21	\$71.10
Meridian	39.90	17.25	
Emmett	11.73	114.30	
New Plymouth	22.70	97.40	
Parma	253.46	18.80	
Nyssa	570.37	94.65	.25
Ontario	246.32	259.03	5.55
Payette	138.88	748.70	1.10
Weiser	105.31	20.95	
Huntington	679.85	304.29	
Gypsum		106.80	
Total	<u>3,676.14</u>	<u>598.96</u>	<u>78.00</u>

OTHER EQUIPMENT.

Items.	Amount
Stable Equipment	\$ 44.50
Store Equipment	5.70
Tools, Instruments & Shop Equipment...	1,152.54
Total	1,202.74

ENGINEERING & GENERAL EXPENSES.

Items.	Amount
Engineering & Superintendence	\$ 89.10
Legal Expense During Construction.....	739.54
General Expense	1,772.97
Engineering Investigations	12.00
Commission on Bonds	100.00
Total	2,713.61

ONTARIO WATER PLANT.

Items.	Amount
Plant and Machinery	\$ 2.75
Mains and Services	15.40
Miscellaneous Expense	7.75
Total	25.90

SUMMARY.

Items.	Amount
Power Plant Improvements	\$ 1,506.21
Transmission Lines	38,363.03
Substations	12,331.45
Distribution System	58,947.90
Transformers	3,676.14
Meters	598.96
Arc Lamps	78.00
Office Furniture & Fixtures	389.90
Other Equipment	1,202.74
Engineering & General Expenses.....	2,713.61
Ontario Water Works	25.90
Total	119,833.84

(Endorsed): Filed, 1914. A. L. Richardson, Clerk.

DECISION IN PROCEEDING RELATING TO
825 FIRST MORTGAGE BONDS.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,

Plaintiff,

vs.

IDAHO-OREGON LIGHT & POWER COMPANY,
a Corporation, BANKERS TRUST COMPANY,
a Corporation, and F. N. B. CLOSE,

Defendants,

and

A. W. PRIEST, et al.,

Interveners.

Aug. 24, 1914.

E. E. Prussing, and Sullivan & Sullivan,
Attorneys for Plaintiff.

Cavanah, Blake & MacLane,
Attorneys for Idaho-Oregon Light &
Power Company and Idaho Railway
Light & Power Company.

A. A. Fraser,
Attorney for Idaho Railway Light &
Power Company.

Perky & Crow,
Attorneys for Bankers Trust Com-
pany and F. N. B. Close.

Joseph Cummins and Richards & Haga,
Attorneys for Interveners.

Eldon Bisbee, Amicus Curiae.

DIETRICH, DISTRICT JUDGE:

This suit was brought by the plaintiff as trustee to foreclose a trust deed given by the defendant Idaho-Oregon Light & Power Company, hereinafter called the Power Company, upon all of its property, consisting chiefly of hydro-electric power plants and power and light distributing systems in Idaho and Oregon, to secure an issue of 7000 bonds of the par value of \$1000.00 each, of which 3319 have been certified and are apparently outstanding. The defendants, Bankers Trust Company and F. N. B. Close, are the trustees named in a second trust deed given to secure a large issue of bonds referred to in the record as the second or consolidated bonds, of which about \$1,800,000.00 are outstanding. A. W. Priest and his associate interveners are the several owners of first mortgage bonds, and constitute a bondholders' committee, controlling approximately 400 of the first mortgage bonds at the time of the intervention, and 2000 at the time of the hearing. The present controversy involves the status of 825 of the remaining bonds of this issue, which are claimed by the Idaho Railway Light & Power Company (hereinafter referred to as the Railway Company), and arises in this way: A short time before the decree was entered foreclosing the first mortgage, the Priest committee sought to intervene, with the object of preventing foreclosure, upon the ground that the Railway Company, which had control of the Power Company, was promoting the foreclosure as a means of wrecking the Power Company, greatly

to the injury of the holders of first mortgage bonds who had no corresponding interest in the Railway Company. While the decree of foreclosure was not delayed, its entry was with certain reservations, in harmony with which the Priest committee was permitted to intervene for the purpose, among others, of opposing the recognition of the right of the bonds held by the Railway Company to share in the distribution of the proceeds of the sale of the property. For reasons which it is not necessary here to state, the foreclosure sale has been postponed from time to time, and, it being the desire of all parties that the rights of the Railway Company upon distribution, be determined without further delay, a hearing was had upon the complaint in intervention and the answer thereto filed by the Railway Company. (In compliance with an order of the court, the Power Company has also answered, but in view of its insolvency and its subserviency to the Railway Company, its position in the controversy is without importance). It thus appears that while in form the Priest committee has taken the initiative, the proceeding is in anticipation of the foreclosure sale and the distribution of the proceeds thereof; and, considering the substance only, the controversy is to be deemed to be one arising after the sale, with the Railway Company seeking an order distributing to it its proportionate share of the proceeds of the property, and the Priest committee, as bondholders, resisting, upon the grounds set forth in their complaint in intervention. It is upon the assumption that such is the

real nature of the proceedings that, for the convenience of the parties, and in deference to their desire, the issue is determined at the present time. It should be added that all parties have assumed that a sale and reorganization are inevitable, and that it is wholly improbable that the proceeds will be sufficient to pay in full the first mortgage bonds outstanding, aside from those presently involved.

1. The only question now raised touching 107 of the bonds is whether their certification by the trustee and delivery to the Power Company were authorized under the terms of the trust deed, the point being that they were certified and delivered after default in the payment of an installment of interest due upon the bonds already sold, namely, all the other bonds now outstanding. There is nothing in the trust deed either expressly or by fair implication prohibiting such action, and I am unable to see how any principle of right or justice was violated. It was shown by the trustee, and is not now denied, that the Power Company had made the improvements and expenditures upon its property required by the trust deed, and that all other conditions precedent prescribed therein had been performed. The objection is therefore thought to be without substantial merit.

From the answer of the Power Company and some of the evidence it would appear that these bonds are held by the Railway Company only as collateral, but by agreement of the parties the question of the nature and extent of its right or title thereto is exclud-

ed from consideration, and the order or judgment herein will be without prejudice to its determination in another proceeding.

2. We come now to the 718 bonds. Conceding that they were all properly certified and delivered to the Power Company, the interveners object that the Railway Company should be denied participation in the distribution on account thereof, by reason of the fact that, through its control of the Power Company, it could and did wrongfully and without consideration procure possession thereof. Two transactions are involved, one in September, 1912, by which the Railway Company got possession of 440 of the bonds, and the other in December of the same year, by which it procured the other 278. The inquiry having taken a wide range, the evidence is too voluminous to be reviewed in detail, and I shall content myself with stating only such facts as will make reasonably clear the conclusions I have reached: Prior to the fall of 1911 the Power Company was under independent management, and owned most of the properties of which it is now possessed. The principal source from which it expected to procure its power was the Ox Bow plant on the Snake River, and this was still incomplete and unproductive, although, according to the books of the company, sums aggregating approximately \$2,000,000.00 had been spent in promoting and developing it. It being impracticable under the terms of the first trust deed to issue more than \$2,000,000.00 of the bonds for this purpose, a new instrument was created called the

consolidated mortgage, securing a large issue of bonds, \$7,000,000.00 of which, or such part thereof as might be necessary, were to be used in refunding the first mortgage bonds, and \$3,000,000.00 for the completion of the Ox Bow plant, and the construction of necessary transmission lines, and for other corporate purposes. At this time the Power Company was dominated by Mainland Brothers, of Oshkosh, Wisconsin, who, finding that the second bonds were not readily salable upon the market, succeeded in enlisting in an elaborate scheme of reorganization and enlargement, the co-operation of a group of capitalists in New York City, represented by the banking house of Kissel, Kinnicutt & Company, who entered into an agreement to purchase \$1,500,000.00 of the consolidated mortgage bonds at 80, taking as a bonus a large proportion of the capital stock of the company, with certain other options and privileges, some of which will be referred to later. Thereupon, pursuant to the plan agreed upon, the Railway Company was organized, and to it were transferred the Swan Falls power plant and various electric railway lines and lighting systems, all new acquisitions, situated in southeastern Idaho within the general territory served by the Power Company. There were also transferred to it, in exchange for its stock and bonds, all the bonds and stock of the Power Company covered by the contract above referred to; and the Mainlands, as well as most of the other stockholders of the Power Company, exchanged their stock for stock in the Railway Company, thus giving to the

Railway Company complete control of the Power Company. In due time the directors and officers of the Railway Company were elected directors and officers of the Power Company, and undoubtedly from that time on, namely, from about the 1st of January, 1912, the Power Company was completely dominated by the Railway Company.

By September, 1912, Kissel, Kinnicutt & Company, who it is apparent were acting upon behalf of and as the representative of the Railway Company, or, perhaps more accurately, of the syndicate controlling the Railway Company, had taken over 1325 of the 1500 bonds they had agreed to purchase; they were still under obligations to take the other 175, which, at the stipulated price, would amount to \$140,000.00. At this time it is clear they had reached the conclusion that the Power Company was hopelessly insolvent, as was undoubtedly the case, and that their contract to purchase was ill-advised, and their original plan could not be profitably carried out. Further reorganization of some character, and sacrifice in one quarter or another, was doubtless thought to be inevitable.

Such being the situation, on the 25th of September a meeting of the directors was held in New York City, at which the Railway Company claims the contract was authorized under which it later got possession of the 440 bonds. Eight of the eleven directors were present. Aside from the consideration that the directors were all elected by the Railway Company, and the Railway Company was in actual fact

dominated by the Kissel-Kinnicutt syndicate, it is extremely doubtful whether what was done at this meeting could in fact or in law be deemed to be a corporate act. But in view of the essential character of the action which purports to have been taken, and of the nature of substantially the only legal ground upon which the Railway Company contends the interveners must fail, a detailed discussion of this phase of the inquiry is thought to be unnecessary. In harmony with the apparent action taken at the meeting, a written agreement was immediately executed, the formal parties thereto being Kissel, Kinnicutt & Company, designated as the "Bankers," the Power Company, and the Mainlands. Referring to the original Kissel-Kinnicutt contract of September 19, 1911, the instrument recites that 1325 of the bonds had been taken over, and that there were still 175 to be purchased; that Kissel, Kinnicutt & Company were ready to complete their purchase, but were unwilling to take additional bonds under their option; that the Power Company would, in the course of six months, need \$250,000.00; and that Kissel, Kinnicutt & Company offered to procure for the Power Company a loan of this amount, in consideration of their being released from the obligation to take the other 175 bonds, and that the Power Company had accepted this offer. Thereupon follows an agreement to the effect that the "Bankers" would procure the Railway Company (which in reality was wholly insolvent) to make the loan of \$250,000.00, at six per cent interest, \$100,000.00 to be furnished

immediately and the balance at any time within six months upon demand of the Power Company, the loan to be secured by the first mortgage bonds of the Power Company, equal at their face value to twice the amount of the loan. The Power Company was to sign a note containing, among others, a provision that it might be declared due and payable at any time upon default of the payment of interest upon *any* of the outstanding bonds of the Company, or upon the commencement of proceedings against it for the appointment of a receiver. The agreement contained the further extraordinary provision obligating the Power Company at any time upon demand of the Railway Company to exchange its first mortgage bonds, up to \$500,000.00, for an equivalent amount of its second mortgage bonds held by the Railway Company.

That under the circumstances such an agreement was thought by anyone to be in the interest of the Power Company is wholly incredible. I cannot believe that an independent board of directors would have given to it a moment's consideration. The Company needed money it is true, but if it was going on with the Ox Bow development the sum contracted for was wholly inadequate for any useful purpose, and if the work at that point were not to be resumed, there was no urgent need for so large an amount. Those who participated in the transaction are unable to give any reasonable explanation of the purposes for which the \$250,000.00 were to be used, and apparently there is none. The company had

available on demand \$140,000.00, due upon the Kissel-Kinnicutt contract, and surely both upon the market and in fact its first mortgage bonds were worth in excess of fifty cents on the dollar, the basis upon which they were to be hypothecated to procure the loan. Under the conditions created by the agreement the possibility that there ever would be a redemption was so remote as to be negligible. The transaction therefore practically amounted to a sale of between \$200,000.00 and \$500,000.00 face value of the first mortgage bonds for an equivalent amount of seconds, which it is apparent must have been wholly valueless if the firsts were worth less than their face, and the surrender, without any real consideration, of the obligation of the syndicate to take \$175,000.00 face value of the seconds at 80. There is but one rational explanation of the agreement, and that is that the interests in control of the Railway Company, and, through it, of the Power Company, having concluded that the latter was hopelessly insolvent, and that a reorganization was inevitable and a receivership probable, resorted to this expedient for saving to themselves as much of the wreckage as possible. Putting aside for the moment all question of the rights of these intervenors, it is plain that there was a breach of trust on the part of the officers of the Power Company and a disregard of the rights of the holders of approximately \$166,000.00 face value of the consolidated bonds which had been sold upon the market and were held by the general public, who therefore would be prejudiced

by the issuance of first bonds in exchange for the consolidated or seconds.

Upon behalf of the syndicate interests it is suggested that they had put into the enterprise a large amount of money, through the purchase of the consolidated bonds, which were practically worthless, and for that reason they were entitled to a measure of protection at the hands of the Power Company. Assuming that they were entitled to sympathy, it does not follow that they were entitled to protection. Their misfortune in no wise enlarged their rights as parties to the contract, or abated their duty as trustees of the Power Company. As directors, they were bound to subserve the interests of the company, and to hold its property for the common benefit of its creditors, and they were not privileged to strip it of its meager remaining resources for the purpose of recouping their private losses. The adoption of any other view would necessarily be to recognize the rule of might, and to say to him to take who can. Moreover, were the consideration suggested deemed to be a material one, it is to be noted that the original contract of September 19th was not a simple contract for the purchase of a stated number of bonds; it embraces an ambitious scheme of great possible profit to the purchasers. They do not occupy the position of one who has bought worthless securities with no expectation of gain other than a fair interest return. They bargained for the chance of the profit of a speculative enterprise, and they must have contemplated the risk of loss as well

as the chance of gain. To refer to only one feature of the agreement: They had the option to require the retirement of all the first mortgage bonds, which were to be called at a premium, and such were the conditions that by acquiring these bonds, as it was doubtless within their power to a great extent to do, they could, at an actual outlay of probably not to exceed sixty per cent of their face value, secure a large part of the consolidated bonds, which, upon the retirement of the firsts, would constitute a prior lien upon all the property of the company.

What followed the execution of the agreement is not made entirely clear, but apparently at different times money aggregating \$220,000.00 was furnished to the Power Company, ostensibly by the Railway Company, and later, bonds, in installments of various amounts, aggregating \$440,000.00 face value, were turned over to the Railway Company as collateral. Notwithstanding the fact that under the agreement the Power Company was to exchange 500 firsts for seconds only in case firsts were available for that purpose, shortly after the hypothecation of the 440 firsts as collateral, they were exchanged for an equivalent number of seconds, which were substituted as collateral, and the firsts were deposited as collateral with the Railway Company's creditors or their trustee. It will be understood, of course, that in speaking of a transfer of possession between the two companies a constructive transfer only is meant, for both had the same secretary and treasurer, as well as other officers.

The facts touching the remaining 278 bonds may be more briefly stated. In the fall of 1912 the Power Company desired to make a settlement and terminate its relations with Bates & Rogers, a construction company having a contract for work on the Ox Bow plant. According to the records, the settlement was consummated at a meeting of the executive committee of the Power Company held in New York City on December 27th. What actually occurred at this meeting is open to serious doubt, but assuming that what purports to be the record is genuine and speaks truly, an agreement was reached with Bates & Rogers by which, in part consideration to them for a complete settlement, they were to receive \$25,000.00 face value of the Power Company's consolidated bonds, 50 shares of the preferred, and 100 shares of the common stock of the Railway Company, and its obligation (unsecured) to purchase from them within 60 days after the 29th of May, 1914, the \$25,000.00 bonds at 80 and accrued interest. Thereupon, such is the record, the Power Company and the Railway Company proceeded to ratify this arrangement, and in consideration of the Railway Company's agreement to deliver to Bates & Rogers 100 shares of its common stock, which was worthless, and 50 shares of its preferred stock, which was equally worthless, and its obligation to buy the bonds, which, because of its insolvency, if for no other reason, was unenforceable, and hence practically of no value, the Power Company was made to agree that it would, upon the demand of the Rail-

way Company, deliver its first mortgage bonds up to \$500,000.00 face value (the same to be in excess of those covered by the September contract) in exchange for consolidated bonds, which also were without substantial value. From the testimony and the surrounding circumstances, no doubt is left in my mind that the Power Company could have made settlement directly with Bates & Rogers with its first mortgage bonds at a comparatively small discount, and that the devious course was adopted not upon their demand or for the interest of the Power Company, or because of any necessity therefor, but for the sole purpose of furnishing a pretext for getting the first mortgage bonds out of the treasury of the Power Company and into the hands of the Railway Company, and for the interest alone of those by whom the latter company was dominated.

Relying upon the rule that the contract of a corporation with its directors, or touching a matter in which they are interested, is not absolutely void, but only voidable, the Railway Company urges with much apparent confidence that the intervenors must fail because, as mere bondholders, they have no such right or interest as entitles them to attack the transactions in question. Its position is that their rights are measured solely by the terms of the bonds and the trust deed securing the same, and that no provision of these instruments has been violated. That, such being the case, it is a matter of no legal concern to them how it procured the bonds,—and they would have no standing to call into question a gift

or even a theft thereof. That if any wrong has been done it can be remedied only upon the demand of the corporation, or, in case of its inaction, of its stockholders.

It may be conceded that as a general rule the creditor of a solvent corporation, be he secured or unsecured, has no legal right to complain of the improvident disposition of its property. But it must not be forgotten that here the corporation was insolvent, and those whose duty as trustees it was fairly and honestly to administer its affairs, undertook to prefer themselves. An insolvent corporation cannot rightfully give away its property in fraud of its creditors, neither can it legitimately prefer the claims of its officers and stockholders. In *Jackson v. Ludeling*, 88 U. S. 616, a suit in equity brought by bondholders against the directors of the debtor corporation, attacking the validity of a judicial sale of its property, at which the directors became the purchasers, the court said: "They (the directors) had no right to enter into or participate in a combination, the object of which was to divest the company of its property and obtain it for themselves at a sacrifice or at the lowest price possible. They had no right to seek their own profit at the expense of the company, its stockholders, or even its bondholders. Such a course was forbidden by their relation to the company. It was their duty, to the extent of their power, to secure for all those whose interests were in their charge the highest possible price for the property which could be obtained for it at the

sheriff's sale. They could not rightfully place themselves in a position in which their interests became adverse to those of either the stockholders or bondholders. * * * * * The defendants can take nothing from such a sale, thus made. Were we to sustain it, we should sanction a great moral and legal wrong, giving encouragement to faithlessness to trusts, and confidence reposed, and countenance combinations to wrest by the forms of the law from the uninformed and confiding their just rights." In *Wabash, St. Louis & Pacific Railway Co. v. Ham*, 114 U. S. 587, 594, it was said: "The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them." By Wood, J., it was said in *Lippincott v. Shaw Carriage Co.*, 25 Fed. 577, 586, that: "While it is generally conceded that a corporation, notwithstanding insolvency, continues possessed of a general power of management of its affairs, and like natural persons may give preferences by way of payment or security to one creditor or class of creditors over others; yet, in close analogy to the rule which forbids the giving of preferences

by individual debtors for the purpose of securing, or in such manner as to secure, advantage or benefit to themselves, and in manifest accord with the tendency of judicial opinion as expressed upon consideration of kindred questions, it has been decided in a number of cases that preferences given by insolvent corporations in such manner as to be of special benefit to the directors or managing agents, or any of them, will be set aside. This, as it seems to me, is the salutary rule, and the only rule which can be administered with uniformity and fairness." And most pertinent is the language used by the same judge in *Howe, Brown & Co., v. Sanford Fork & Tool Co.*, 44 Fed. 231, 233, where he said: "It seems to me enough to say that a sound public policy and a sense of common fairness forbid that the directors or managing agents of a business corporation, when disaster has befallen or threatens the enterprise, shall be permitted to convert their powers of management and their intimate, and it may be, exclusive, knowledge of the corporate affairs into means of self-protection to the harm of other creditors. They ought not to be competitors in a contest of which they must be the judges. The necessity for this limitation upon the right to give preferences among creditors when asserted by corporations may not have been perceived in earlier times, but the growing importance and variety of modern corporate enterprises and interests I think will compel its recognition and adoption. The fact in this case that the stockholders authorized the making of the mortgage seems to be immaterial. That action was, it is

averred, procured by the directors proposed to be benefited, they, themselves, being stockholders; and, even if this were not averred, the case would not, I think, be essentially different. Whether or not such preferences are fairly given is an impracticable inquiry, because there can be in ordinary cases no means of discovering the truth; and consequently the presumption to the contrary should in every case be conclusive. Concede that it is a question of proof, and that a preference in favor of a director will be deemed valid if fairly given, and it may as well be declared to be a part of the law of corporations that in cases of insolvency debts to directors and liabilities in which they have a special interest must be first discharged. That will be the practical effect, and the examples will multiply of individual enterprises prosecuted under the guise of corporate organization, for the purpose, not only of escaping the ordinary risks of business done in the owner's name, which may be legitimate enough, but of enabling the promoters and managers, when failure comes, to appropriate the remains of the wreck by declaring themselves favored creditors. Besides inconsistency with that equality which Equity loves, such favors involve too many possibilities of dishonesty and successful fraud to be tolerated in an enlightened system of jurisprudence." See also *Sweeney v. Grape Sugar Co.*, 4 S. E. 431, and *Richardson v. Green*, 133 U. S. 534.

It is a mistake to assume that the intervenors contracted only for certain security and that all their

rightful demands were satisfied when it was properly certified that the requisite expenditures and improvements had been made. They contracted for security, it is true, but primarily they contracted for payment, and the continuing obligation of the Power Company was to pay its bonds in accordance with their terms. The intervenors were creditors of the company, not merely claimants of a share in a disputed fund. Upon entering into the contract they had the right to assume that the business of the company would be conducted, if not wisely, at least fairly and honestly. At the time these transactions took place, the Power Company was wholly insolvent, and for that reason its stockholders, even had they been free to act upon its behalf, had no incentive to exercise vigilance or to take any action for the protection of its interests. In short, the corporation had wholly lost the protection of its natural guardians. As was said by the Supreme Court of West Virginia in *Sweeney v. Grape Sugar Co.*, *supra*; "In the case of a corporation which is wholly insolvent and unable to continue its business, neither the corporation itself nor its stockholders have any beneficial interest in its property and, therefore, they cannot be affected by the fraud. In such case, the creditors alone can be affected and they alone have any interest in avoiding the contract." It will not do to say that the bondholders represented by the intervenors had no rights which they were entitled to have safeguarded. Their claims being inadequately secured, they would ulti-

mately be compelled to look for payment in full to the general assets of their debtor. Moreover, they were entitled to have their mortgage securities maintained as well as created. From what fund the certified expenditures on account of capital were made does not appear, but that for the protection of their security they were interested in having these bonds honestly used for the benefit of the estate becomes apparent when the fact is noted that, as shown by the record here, preferential claims for labor and supplies for the maintenance and operation of the property, aggregating an amount relatively of great magnitude, are being pressed for allowance, in at least one of which the Railway Company itself is interested, and which, if established, will substantially reduce the value of the intervenors' security. These and other considerations strongly persuade me to the view that in response to the prayer of the intervenors in a plenary suit a court of equity could have properly interfered to prevent the illegal diversion of the bonds, or could now decree their restoration. But it is not necessary to go so far; we have here no plenary suit in which creditors are seeking affirmative relief for themselves or the restoration of property to the corporation. The Railway Company is in reality the actor. It is not content with what it was thus wrongfully able to acquire through its control of the Power Company. It is dependent upon, and is here invoking, the assistance of a court of equity to make actually available to it the fruits of its wrong-doing. Through

the trustee, it seeks a foreclosure of the security of the bonds and an order distributing to it a proportionate share of the proceeds of the property. It is asking the court to aid it in enforcing contracts the possession of which it obtained in a manner violative of sound principles of public policy and of good morals, and in that view it is quite unimportant whether the intervenors would have any standing as plaintiffs in an independent suit. Regardless of who objects or whether anyone objects, a court will not knowingly assist a party to reap the fruits of his wrong-doing, and under the rule the Railway Company must be denied the relief which it seeks.

Upon its behalf it is urged that even in this view it should be recognized as having an equity in the bonds corresponding to the consideration it has paid out, of which the Power Company received the benefit, and to this extent it is thought its contention should be sustained. The Power Company is entitled only to be protected against loss, and not to be enabled to reap a profit from the attempted wrong; insofar as may be possible, there should be a restoration of which it has received. Upon this branch of the case, however, I am inclined to think the record is incomplete, and further evidence will have to be taken, unless the facts can be stipulated. To what extent the receiver will be able to return in specie the stocks and securities which presumably the Railway Company turned over in exchange for the bonds does not appear, nor is there such a statement of account between the Railway Company and the syn-

dicating upon the one side and the Power Company on the other that I can intelligently ascertain the amount for which the Railway Company should be awarded an equitable lien upon the bonds. Nor is there any definite information touching the present status of the Bates & Rogers affair. While the 440 bonds acquired under the agreement of September 25th are apparently not held as collateral under the first provision of the contract, but by virtue of an exchange under a later provision, and, strictly speaking, are therefore technically subject to no other equity than the obligation to return the exchanged consolidated bonds, which are already in the possession of the Railway Company as collateral, I shall regard the substance rather than the form, and accordingly the moneys actually advanced to the Power Company under the contract of September 25th will be charged against the bonds, such advances to be first subject to a deduction of such amount, if any, as remains of the \$140,000.00 due under the original contract of September 19th, 1911, after satisfying therefrom any other claims for advances made to the Power Company properly chargeable against that obligation. It is not improbable that the accounting and other information required for such purpose will more or less directly relate to the issue of the Railway Company's interest in the 107 bonds, and both matters can proceed together. However that may be, it is my desire that the evidence upon both branches of the controversy be taken and submitted without unnecessary delay. Pre-

sumably the facts are largely within the knowledge of the Railway Company, and it will be required to take the affirmative in establishing such equities as it claims. The receiver is authorized to participate insofar as, upon the advice of counsel, he may deem it to be necessary for the protection of the estate.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,
Plaintiff,

vs.

IDAHO-OREGON LIGHT & POWER CO., et al.,
Defendants.

SUPPLEMENTAL DECISION RELATING TO
825 FIRST MORTGAGE BONDS.

SEPT. 18, 1914.

DIETRICH, DISTRICT JUDGE:

The parties have now appeared by their respective counsel, and have agreed that the existing record touching the transaction of September 25th, 1912, should be construed as showing that the Railway Company advanced \$250,000.00, and no more, for which it is entitled to credit under the principle of adjustment explained in the opinion filed August 24, 1914. From this amount, therefore, will be deducted the \$140,000.00 due under the original con-

tract, and the Railway Company will be decreed an equitable lien upon the 440 first mortgage bonds for the balance of \$110,000.00, with interest, and it will also be decreed the right to receive the 175 second mortgage bonds contracted for.

As to the Bates & Rogers transaction, no additional evidence has been offered, and it is not thought that the record shows that the Railway Company has parted with anything of value on account thereof or has any substantial equities in the premises.

BILL TO FORECLOSE IN EQUITY—NO. 444.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,

Plaintiff,

vs.

IDAHO-OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY and F. N. B.
CLOSE,

Defendants.

And

A. W. PRIEST, et al.,

Interveners,

vs.

IDAHO-OREGON LIGHT & POWER COMPANY
and IDAHO RAILWAY, LIGHT & POWER
COMPANY,

Respondents.

PETITION IN INTERVENTION.

DECREE RESPECTING THE CERTIFICATION
OF 107 BONDS AND THE OWNERSHIP
AND STATUS OF 718 BONDS.

It appearing to the Court that the main action herein is a suit to foreclose a certain mortgage or deed of trust, executed by the defendant Idaho-Oregon Light & Power Company to the State Bank of Chicago, as Trustee, securing an issue of bonds to the authorized amount of \$7,000,000.00, of which 3,319 of the par value of \$3,319,000.00 were alleged to be issued and outstanding, said bonds being known as First and Refunding Mortgage Bonds;

And it further appearing that A. W. Priest and others, being the owners and holders, individually, of bonds of the said issue and secured by the said mortgage to the plaintiff, and also constituting and acting as a Bondholders' Committee and as such holding and representing other bonds of the same issue to a large amount, have heretofore filed their petition in intervention in said cause;

And it further appearing that by an order entered herein on September 19th, 1913, the said Bondholders' Committee was authorized and permitted to intervene for certain purposes as in said order specified, and the said defendant Idaho-Oregon Light & Power Company was required to answer the allegations of the said petition with reference to a certain 718 bonds of the said issue secured by the mortgage

to the plaintiff, and also with reference to a certain other 107 bonds, and also with reference to a certain other 520 bonds;

And it further appearing that the Idaho Railway, Light & Power Company was by said order made a party to the action for the purpose of answering, and was directed to answer the allegations of the said petition or bill in intervention respecting the said 718 bonds;

And the cause now coming on to be heard upon the said petition or bill in intervention, and the answers of said Idaho-Oregon Light & Power Company, Idaho Railway, Light & Power Company and State Bank of Chicago to said bill in intervention, and upon the evidence taken upon the issues thus joined, and in conformity with the opinion heretofore rendered herein on August 24th, 1914;

And it further appearing that since the filing of the said bill in intervention and the said answers thereto, one W. J. Ferris has been appointed by this Court Receiver of the said Idaho-Oregon Light & Power Company and all of its property and effects, and is now in possession or entitled to the possession thereof as such Receiver, and that in another proceeding, now pending and undetermined in this Court, one O. G. F. Markhus has been appointed Receiver of said Idaho Railway, Light & Power Company and is now in the possession, or entitled to the possession, of all the property and effects of said Idaho Railway, Light & Power Company as such Receiver.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I.

That said W. J. Ferris and said O. G. F. Markhus are hereby made parties to this decree, as Receivers, respectively, of said Idaho-Oregon Light & Power Company and said Idaho Railway, Light & Power Company, so far as may be necessary for its enforcement.

II.

That the said 107 bonds were duly and legally certified by the Trustee, said State Bank of Chicago, and delivered to the said defendant Idaho-Oregon Light & Power Company.

It appears from the answer of the Power Company and from some of the evidence that these bonds are now held by the Railway Company, but only as collateral, and by agreement of the parties the question of the nature and extent of the right or title of the Railway Company thereto is excluded from consideration, and this judgment is without prejudice to the determination of the status, title and ownership of the said 107 bonds in another proceeding.

III.

That the alleged agreement of September 25th, 1912, which includes the proposed exchange of bonds of the issue secured by the mortgage to the plaintiff to the number of 500, having a par value of \$500,000.00, for other junior or second mortgage bonds, having a par value of \$500,000.00, entitled "Con-

solidated First and Refunding Mortgage Bonds," secured by mortgage to the defendants Bankers Trust Company and F. N. B. Close, and the exchange of such bonds made in pursuance thereof, are illegal and void, and that the said respondent Idaho Railway, Light & Power Company is not entitled to share in the proceeds of the mortgage sale of the property covered by the said mortgage to the plaintiff, as the owner of said bonds, exchanged in pursuance thereof, and secured by said mortgage to the plaintiff, except as hereinafter provided.

IV.

It appearing that as a part of the said agreement of September 25th, 1912, the said Idaho Railway, Light & Power Company was to loan \$250,000.00 to said Idaho-Oregon Light & Power Company, but that it was at the same time entitled to receive upon demand \$140,000.00 in payment for the second or so-called Consolidated Bonds to the par value of \$175,000.00, which right and demand was, or was attempted to be, released and discharged by and in pursuance of the same agreement; that the said \$250,000.00 when so loaned was to be secured by the deposit of first mortgage bonds secured by the mortgage to the plaintiff herein, which bonds were so deposited to the amount of \$440,000.00, but which in pursuance of the exchange agreement were withdrawn as such collateral and for the purpose of carrying out the said exchange, and that there were substituted therefor consolidated or second mortgage bonds as such collateral; and it appearing that all

of these transactions, to-wit: the agreement for and the making of the said loan, the release by the Idaho-Oregon Light & Power Company of its right and demand to receive \$140,000.00 in payment for \$175,000.00 par value of consolidated bonds; the agreement for the exchange of bonds by which the Idaho-Oregon Company surrendered first mortgage bonds and received back second or consolidated bonds, and the several deposits and exchanges of collateral in connection therewith, were all connected and interdependent, and each constituting a consideration for the others;

IT IS ORDERED, ADJUDGED and DECREED that the said Idaho-Oregon Light & Power Company, by its Receiver W. J. Ferris, is entitled to receive back from said Idaho Railway, Light & Power Company the 440 first mortgage bonds, secured by the trust deed to the plaintiff herein, which were exchanged as part of said transaction; that the said Idaho Railway, Light & Power Company, by its Receiver O. G. F. Markhus, is entitled to receive back from the said Idaho-Oregon Light & Power Company second mortgage or consolidated bonds to the amount of \$440,000.00 which it, the said Idaho Railway, Light & Power Company, gave in said exchange; that said Idaho Railway, Light & Power Company by its Receiver is entitled to recover from said Idaho-Oregon Light & Power Company the sum of \$110,000.00, being the amount advanced or loaned by said Railway Company to said Power Company in excess of the \$140,000.00 which the said Power Company

was entitled to receive, with interest at the rate of six per cent. (6%) per annum thereon, from the dates when the sums constituting the said \$110,000.00 were so advanced, and that such advances and the dates thereof are as follows:

December 14, 1912,\$40,000.00

December 16, 1912,\$40,000.00

January 4, 1913,\$30,000.00

that the said Idaho Railway, Light & Power Company, by its Receiver, is entitled to the possession, as collateral security for the repayment of the said \$110,000.00 and interest, of the \$440,000.00 of first mortgage bonds originally deposited by said Idaho-Oregon Light & Power Company as collateral for the loan agreed to be made on September 25th, 1912; it appearing that the \$440,000.00 of first mortgage bonds are now in the possession of the said Idaho Railway, Light & Power Company, or its Receiver. IT IS ORDERED AND ADJUDGED that he retain the same, but not as the property of the said Idaho Railway, Light & Power Company but as collateral to the said indebtedness of \$110,000.00 and interest, as above set forth, and that all second mortgage or consolidated bonds held by said Idaho Railway Light & Power Company, or its Receiver, as collateral to the indebtedness, or alleged indebtedness, growing out of the agreement of September 25th, 1912, be surrendered by said Idaho Railway, Light & Power Company and its Receiver to said W. J. Ferris, Receiver of said Idaho-Oregon Light & Power Company.

V.

That upon sale of the mortgaged property under the foreclosure proceedings herein the said Idaho Railway, Light & Power Company, or its Receiver, shall be entitled to share in the proceeds thereof, as the holder of said 440 bonds as collateral to secure the said indebtedness of \$110,000.00 and interest.

VI.

It further appearing that in December, 1912, a further agreement, or pretended agreement, was made by the said Idaho-Oregon Light & Power Company and said Idaho Railway, Light & Power Company, whereby a further exchange of first mortgage bonds secured by the mortgage to the plaintiff herein, which the said Idaho-Oregon Light & Power Company was then entitled to issue under said first mortgage, were to be exchanged for second or consolidated bonds, issued by said Idaho-Oregon Company and then held by said Idaho Railway, Light & Power Company, up to a total par value of \$500,000.00 in consideration of an agreement made, or to be made by said Idaho Railway, Light & Power Company, whereby said Idaho Railway, Light & Power Company was to contract with the Bates & Rogers Construction Company to purchase back upon a certain demand from said Bates & Rogers Construction Company \$25,000.00 face value of the Power Company's consolidated bonds, and also to issue to the said Bates & Rogers Construction Company fifty (50) shares of the preferred and one hundred (100) shares of the common stock of the Railway Com-

pany; and it further appearing that an additional 278 first mortgage bonds, secured by the mortgage to plaintiff herein, having a par value of \$278,000.00, were so exchanged with the Railway Company for second or consolidated bonds of said Power Company, then held by said Railway Company, having a par value of \$278,000.00;

IT IS FURTHER ORDERED, ADJUDGED and DECREED, that the said agreement for such further exchange is illegal and void, and the exchange made thereunder invalid and fraudulent, and that said Idaho Railway, Light & Power Company, or its Receiver, shall return to said Idaho-Oregon Light & Power Company or its Receiver the said 278 first mortgage bonds, having a par value of \$278,000.00, and that the said Idaho-Oregon Light & Power Company or its Receiver shall return to said Idaho Railway, Light & Power Company or its Receiver the said second or consolidated bonds to the par value of \$278,000.00, so far as they may be in its or his possession either now or in pursuance of the foregoing portion of this Order, and that so far as they may be already in the possession of the Railway Company the said Idaho-Oregon Light & Power Company and its Receiver shall relinquish all right and title thereto.

VII.

IT IS FURTHER ADJUDGED and DECREED, that Idaho Railway Light & Power Company is entitled to receive from Idaho-Oregon Light & Power Company second or consolidated mortgage bonds of

said Idaho-Oregon Light & Power Company, secured by the deed of trust to said Bankers Trust Company and F. N. B. Close, to the par value of \$175,000.00 on account of the \$140,000.00 charged against the advances to the Idaho-Oregon Company. And it is ORDERED that upon sale and distribution under the foreclosure herein, said Idaho Railway, Light & Power Company shall be entitled to share in the distribution of the surplus for the second mortgage bondholders, if any, as the holder of such bonds, to the par value of \$175,000.00 in addition to other second mortgage bonds which it now holds or to which it is entitled; and in the meantime said Idaho-Oregon Light & Power Company shall, upon demand from said Idaho Railway, Light & Power Company, deliver the said second or consolidated mortgage bonds to the par value of \$175,000.00.

VIII.

This decree is entered in advance of sale and distribution under the said foreclosure at the request of and for the convenience of the parties, and upon the agreement in open court, all parties hereto consenting, that this decree shall be regarded so far as such fact may be at any time material, as having been made after sale and upon distribution, and as upon an application of said Railway Company as bondholders to share in such distribution and as against objection by these intervening bondholders and that no objection shall be made to said decree by any party affected thereby at any time or place,

upon the ground that the same is premature or untimely.

Entered this 18th day of September, 1914.

FRANK S. DEITRICH,

District Judge.

Filed September 19, 1914.

IN EQUITY NO. 444.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,

Plaintiff,

v.

IDAHO-OREGON LIGHT & POWER COMPANY,
et al.,

Defendants,

And

A. W. PRIEST, et al.,

Interveners.

ON BILL IN INTERVENTION.

STATEMENT OF EVIDENCE UNDER EQUITY
RULE 75.

Lodged October 19, 1914.

Filed, 1914. A. L. Richardson,
Clerk.

IN EQUITY NO. 444.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO,

Plaintiff,

v.

IDAHO-OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY and F. N. B.
CLOSE.

Defendants,

And

A. W. PRIEST, et al., individually and as a bond-
holders committee,

Interveners.

v.

STATE BANK OF CHICAGO, IDAHO-OREGON
LIGHT & POWER COMPANY, IDAHO RAIL-
WAY, LIGHT & POWER COMPANY, and O. G.
F. MARKHUS, as Receiver of Idaho Railway,
Light & Power Company,

Respondents.

ON BILL IN INTERVENTION.

STATEMENT OF EVIDENCE UNDER EQUITY
RULE 75.

BE IT REMEMBERED that this cause came
regularly on for trial before the Court, sitting in
equity, on the Bill in Intervention of A. W. Priest,
et al., individually and as a bondholders committee,
and the issues made thereon by the answers of State
Bank of Chicago, Idaho-Oregon Light & Power Com-

pany, and Idaho Railway, Light & Power Company, appearing in its corporate capacity and by its Receiver, O. G. F. Markhus, duly and regularly appointed by order of the above Court on December 23, 1913, in a cause then and there, and still pending, wherein Westinghouse Electric & Manufacturing Company was plaintiff, and Idaho Railway, Light & Power Company was defendant.

The following solicitors appeared for the respective parties:

For the interveners, hereinafter sometimes styled the "Priest Committee," Joseph W. Cummins, Esq., and J. H. Richards, Esq.; for the respondent, State Bank of Chicago (the complainant in the cause), Eugene E. Prussing, Esq.; for respondent, Idaho Railway, Light & Power Company, hereinafter sometimes called "Railway Company," Alfred A. Fraser, Esq.; for respondent, Idaho-Oregon Light & Power Company, hereinafter sometimes called "Power Company," and O. G. F. Markhus, as Receiver of Idaho Railway, Light & Power Company, John F. MacLane, Esq.; *amicus curiae*, Eldon Bisbee, Esq.

The principal bill was one filed for the foreclosure of a mortgage upon the properties of the Idaho-Oregon Light & Power Company, being a hydroelectric power company operating in southwestern Idaho and eastern Oregon. The bill was filed on July 7th, 1913, and the cause passed to decree of foreclosure on August 20th, 1913. Thereafter, pursuant to reservation of jurisdiction in the decree, and

on September 1913, the bill in intervention here on trial was filed by the interveners individually as bondholders, and as a committee representing other holders of bonds secured by the mortgage being foreclosed, in which bill various charges of mismanagement and fraud were directed against the Power Company and the Railway Company, which owned other hydro-electric properties, and an electric railway line in southwestern Idaho, and then owned nearly all the capital stock of the Power Company, and a number of its second mortgage bonds secured by the mortgage to the Bankers Trust Company and F. N. B. Close, defendants to the original cause, and which was claimed to have dominated the policies of the Power Company since the fall of 1911, in its own interest. The bill further charged that the Railway Company had, without consideration, procured to be issued to itself 718 First Mortgage Bonds, being the bonds secured by the mortgage foreclosed by decree, in exchange for a like number of Second Mortgage Bonds, sometimes herein referred to as Consolidated Bonds, previously held by it, and had also procured to be certified after default in payment of interest coupons due April 1, 1913, 107 First Mortgage Bonds. Other charges were made with respect to 520 bonds and alleged payments of the April first interest coupons. The Court on September 19, 1913, excused the respondents from answering the charges of fraud and mismanagement, but ordered issues made up on the other charges as to exchange and certification of the bonds and interest payments above mentioned.

The following stipulation was entered into:

“The issues created by paragraph two of the Court’s order of September 19, 1913, in so far as that paragraph requires the Power Company to “answer relative to the 520 First Mortgage Bonds, included in the 2124 bonds, referred to in paragraph XIV of the bill in intervention,” and paragraph four of said order, reading “that the complainant and the defendant, Idaho-Oregon Light & Power Company answer the allegations of said bill in intervention as to the matter and manner of payment of interest due April 1, 1913, under the mortgage herein foreclosed to a portion of the holders of the bonds secured by said mortgage” are herewith withdrawn from further consideration on this intervention.”

The interveners then presented their case as follows:

IT WAS STIPULATED that the interveners, the Priest Committee, hold as a bondholders protective committee approximately \$2,000,000.00 of the First and Refunding Mortgage Bonds secured by mortgage to the State Bank of Chicago, the complainants in the main cause.

MR. CUMMINS offered and there was received in evidence Intervenors Exhibit No. 1, the following contract between Kissel, Kinnicutt & Company, Idaho-Oregon Light & Power Company, and William and S. Mainland, which was as follows:

Intervenors Ex. No. 1.

AGREEMENT made this 19th day of September, 1911, between KISSEL, KINNICUTT & COM-

PANY (hereinafter called the "Bankers") parties of the first part, IDAHO & OREGON LIGHT & POWER COMPANY, a Main corporation (hereinafter called the "Oregon Company") party of the second part, and W. and S. MAINLAND, a firm transacting business in the City of Oshkosh, Wisconsin, and composed of Messrs. William and Sinclair Mainland, (hereinafter called the "Mainlands") parties of the third part.

WHEREAS the Oregon Company has an authorized capital stock of \$10,000,000. par value, of which \$2,500,000. is Six per cent cumulative preferred stock, and \$7,500,000. is common stock, all of which stock is divided into 100,000 shares of the par value of \$100. each; and

WHEREAS \$673,600 par value of said preferred stock, and \$1,888,360. par value of said common stock is issued and outstanding in the hands of the general public other than the Mainlands; \$90,400. par value of said preferred stock and \$1,568,340. par value of said common stock is owned or controlled by the Mainlands, and \$1,736,000. par value of said preferred stock and \$2,043,300. par value of said common stock is owned by the Mainlands, who have agreed to contribute said stock to the Oregon Company for the purposes of this agreement; and

WHEREAS the Oregon Company has approximately \$3,089,000 face value of First Mortgage and underlying bonds now issued and outstanding (hereinafter referred to as the "Prior Lien Bonds") all of which are of prior lien to the Company's Consoli-

dated First and Refunding Mortgage Six per cent. Gold Bonds hereinafter referred to; and

WHEREAS the Oregon Company has authorized an issue of \$10,000,000 face value of its bonds secured by a mortgage and Deed of Trust made to the Windsor Trust Company of New York, and Marmaduke Tilden, Trustee, dated November 1st, 1910, known as its Consolidated First and Refunding Mortgage Six Per Cent. Gold Bonds, hereinafter called the "Consolidated Bonds," of which Consolidated Bonds \$463,000. face value are issued and outstanding; at least \$4,100,000. face value are available for retiring the Prior Lien Bonds, and the balance thereof are available for the development of the water power at Great Ox Bow on the Snake River, in the State of Idaho, and for such other corporate purposes as are more particularly set forth in the said Mortgage and Deed of Trust; and

WHEREAS the Bankers have heretofore loaned to the Oregon Company \$200,000., which said loan is secured by \$400,000 face value of the Consolidated Bonds;

NOW, THEREFORE, this agreement witnesseth: That in consideration of the premises and the mutual covenants hereinafter contained, it is agreed by the parties hereto as follows:

First: As soon as the Bankers, through their engineers and counsel, have made such examination of the Oregon Company's properties, rights, operations, organization, securities and franchises as shall seem to them advisable, which examination shall be

completed within thirty (30) days from the date of the execution hereof; and in the event that the Bankers, as a result of such examination, are satisfied to become interested in the Oregon Company and in the manner and upon the terms hereinafter set forth, the Bankers shall purchase from the Oregon Company and pay for in cash at eighty (80) per cent. of their face value and accrued interest, and the Oregon Company shall sell to the Bankers upon such terms \$1,500,000 face value of the Consolidated Bonds, the Mainlands and the Oregon Company are to transfer and deliver, or cause to be transferred and delivered, to the Bankers upon their completing such purchase, and as additional consideration for so doing \$1,736,000 par value of the Full Paid and Non-assessable Preferred Stock of the Oregon Company, and \$2,371,000 par value of the Full, Paid and Non-assessable Common Stock of the Oregon Company, it being understood and agreed that said last mentioned Preferred stock shall not be entitled to any dividend or dividends thereon earned or accruing prior to April 1st, 1912, and that the period and date from and after which said stock shall be entitled to dividends is fixed as April 1st, 1912, the intent being that such preferred stock shall be entitled to dividends in the same manner and to the same extent as though issued on the 1st day of April, 1912, and not otherwise, and notice of this provision shall be inserted in the certificate or certificates so issued or stamped thereon as the Bankers may hereafter elect.

Second: Of the Preferred Stock and the Common Stock of the Oregon Company to be received by the Bankers under the terms of Paragraph First thereof, approximately \$429,000. par value of the Preferred Stock and approximately \$347,000. par value of the Common Stock shall be transferred and delivered by the Bankers to William F. Cox, Esq., of the Borough of Manhattan, City of New York, pursuant to the terms of an agreement heretofore or hereafter to be made by the Bankers with the said Cox. The covenant of the Bankers to transfer and deliver to said Cox said amount of preferred and common stock of the Oregon Company is herein incorporated for the reason that at the time of the negotiation of this agreement it was determined that the total number of shares of common and preferred stock of the Oregon Company to be received by the Bankers hereunder less the total amount of the shares of said common and preferred stock to be transferred and delivered by the Bankers to the said Cox as aforesaid, should be equal to the aggregate number of shares of both classes of stock owned or controlled by the Mainlands upon the execution hereof; of which said shares of stock to be so received by the Bankers, at least 13,070. shares should be preferred stock, and the representation by the Mainlands contained in the recitals hereto as to the amount of stock of the Oregon Company both common and preferred, owned or controlled by them is a material representation, and this agreement in so far as it relates to the amount of stock to be received

by the Bankers is made in reliance upon such representation.

Third: Upon the execution hereof, if the Oregon Company so desires, the Bankers shall loan to the Oregon Company in addition to the loan heretofore made, the sum of not exceeding \$200,000. until March 16th, 1912, with an option to renew said loan for a further period of ninety days, at the rate of six per cent. per annum; such loan to be evidenced by the note of the Oregon Company for that amount in the same form as that now evidencing the loan of \$200,000. heretofore made to the Oregon Company by the Bankers; said note to be secured by the endorsement thereon of the Mainlands, and the deposit with the Bankers subject to the terms of said note of an amount of Consolidated Bonds equal at fifty per cent. (50%) of their face to the amount of such loan. Upon the Bankers' purchasing said \$1,500,000. of Consolidated Bonds the Oregon Company shall forthwith pay to the Bankers the loan of \$200,000. heretofore made, and the loan agreed to be made in this Paragraph, whether such loans are then due or not.

Fourth: Upon the execution hereof, the Oregon Company and the Mainlands shall secure to the counsel, engineers and other properly accredited agents of the Bankers full opportunity to examine each and all the properties of the Oregon Company, each and all of its contracts, books of account and other corporate books, and such corporate records as counsel for the Bankers may deem necessary in

order to properly pass upon the validity of the Company's organization and franchises, and of its issues of stocks and bonds, and upon the sufficiency of its water rights and the titles to its real estate holdings.

Fifth: In the event that the Bankers purchase the said \$1,500,000. face value of Consolidated Bonds, the Oregon Company, subject to the right of termination hereinafter provided for, hereby grants to the Bankers the right and option for a period of five (5) years from the date of such purchase to purchase from the Oregon Company for cash at eighty (80) per cent. of their face value and accrued interest the whole or any part of the Consolidated Bonds not then or heretofore sold and which are now or may from time to time hereafter be authorized to be issued under and in accordance with the mortgage and Deed of Trust securing the same, including the Consolidated Bonds available as aforesaid, for the purpose of retiring the Prior Lien Bonds. If however, at any time during the term of said option the Oregon Company desires to sell or otherwise negotiate for its proper corporate purposes the whole or any part of the Consolidated Bonds so optioned, and the net earnings of the Oregon Company for a period of twelve (12) consecutive months prior to the date upon which the Oregon Company may notify the Bankers of its desire to sell or otherwise negotiate said optioned bonds, or any part thereof, shall have aggregated a sum of fifty (50) per cent. greater than the interest charges during said period of twelve (12) months upon all of the bonds of the Ore-

gon Company then outstanding and upon such of the said optioned bonds as the Oregon Company may then desire to sell or otherwise negotiate, the Oregon Company may by notice to that effect in writing, specifying the aggregate face value of the optioned bonds sought to be sold or otherwise negotiated, delivered to the Bankers at their office in the City of New York, limit the option period in respect to the bonds so specified to thirty (30) days after the delivery of such notice, and if the Bankers fail to exercise their option with respect to the bonds specified in such notice within said period of thirty (30) days the said right and option in respect to the bonds so specified shall cease and determine, but only if the Oregon Company shall within sixty (60) days after the lapse of the said period of thirty (30) days, sell or otherwise negotiate the Bonds specified in such notice. But the said option of the Bankers in respect to the balance of said optioned Bonds shall continue in full force and effect until and unless terminated by a similar notice or notices delivered to the Bankers during the option period: It being understood that such a notice may be given the Bankers whenever the Oregon Company may desire to sell or otherwise negotiate said optioned bonds or any part thereof, for its proper corporate purposes, and that whenever so given, such notice shall, except as hereinbefore prescribed, serve to limit the option period with respect to the bonds therein specified.

Sixth: The Oregon Company shall purchase from the Bankers any or all the Prior Lien Bonds when-

ever such bonds are tendered to the Oregon Company by the Bankers at the respective call prices thereof, as specified in the Mortgages or Deeds of Trust securing the same, payment of such bonds to be made by the Oregon Company (except as hereinafter in this paragraph provided,) in Consolidated Bonds at eighty (80) per cent. of their face value and accrued interest, the Consolidated Bonds so to be delivered to the Bankers to be taken from the bonds optioned to the Bankers as aforesaid.

If, however, for any reason it may be impracticable or inadvisable for the Oregon Company to pay for prior Lien Bonds so tendered by the Bankers in Consolidated Bonds, the Oregon Company shall upon such tender sell to the Bankers, and the Bankers shall in that event purchase of the Oregon Company an amount of the optioned Consolidated Bonds for cash at eighty (80) per cent. of their face value and accrued interest sufficient to realize the purchase price, as hereinbefore fixed, of the Prior Lien Bonds so tendered, and with the sum so realized shall thereupon purchase from the Bankers the Prior Lien so tendered.

The Oregon Company agrees to call for payment and redemption at a date not later than April 1st, 1915, whenever and in such amount as the Bankers may request, and providing that the number then requested may properly be called for payment, all or any part of the Prior Lien Bonds then outstanding and not theretofore tendered by the Bankers as hereinbefore provided, and upon the calling of such

Prior Lien Bonds, the Bankers agree to purchase from the Oregon Company a sufficient amount of the optioned Consolidated bonds for cash at 80% of their face value and accrued interest to pay off and retire the Prior Lien Bonds so called for redemption.

All Prior Lien Bonds acquired by the Oregon Company through the Bankers or otherwise shall be forthwith cancelled by the Oregon Company and when all of the Prior Lien Bonds issued under any of said Prior Mortgages shall all have been cancelled, the Oregon Company shall take such proceedings as are requisite and necessary to satisfy of record the Mortgage securing such bonds and shall procure it to be so satisfied of record.

Seventh: Upon the Bankers purchasing said \$1,500,000 face value of Consolilated Bonds, the Mainlands and the Bankers shall deposit or cause to be deposited with three trustees, one of whom shall be chosen by the Bankers, one by the Mainlands, and the third by the two so chosen, all of the stock, both Common and Preferred, of the Oregon Company not owned or controlled by them, or either of them, or which they may receive under the terms of this agreement, said stock to be held by the said trustees for a period of five years from the creation of said trust pursuant to the terms of a voting trust agreement wherein the said trustees shall be authorized to vote said stock during the period of said trust for all purposes whatsoever, and shall be granted the right to extend said trust for a further period of five years; said voting trust agreement to contain

such other terms and provisions as shall be mutually agreed upon by the Bankers and the Mainlands, and as shall be requisite and necessary to enable the voting trustees to carry out the consolidation and financial readjustment and all other corporate changes and proceedings in this agreement contemplated.

Not only shall the Bankers and the Mainlands deposit or cause to be deposited all the stock, both Common and Preferred of the Oregon Company owned or controlled by them, but they and each of them shall use their best endeavors to procure the deposit with the said Voting Trustees pursuant to the terms of said voting trust agreement, of all of the balance of the issued and outstanding stock of the Oregon Company.

Eighth: Forthwith after the purchase by the Bankers of the said \$1,500,000 of Consolidated Bonds, such proceedings shall be taken as may be requisite and necessary for the increase of the Board of Directors of the Oregon Company to eleven, and when such increase shall have been duly effected the Bankers and the Mainlands shall exercise all their rights and privileges of whatsoever nature and kind the same may be, to the end that five members of the Board of Directors of the Oregon Company shall be individuals chosen by the Bankers and five members thereof shall be individuals chosen by the Mainlands, and the additional member shall be some individual who shall be mutually agreed upon by the Bankers and the Mainlands. Upon the increase of the Board of Directors as aforesaid, such further proceedings

shall be taken as may be requisite and necessary for the creation of an executive committee of the Board of Directors of the Oregon Company; to whom each and all the powers of the Board of Directors, in so far as it may be permitted by law, shall be delegated during such times as the Board of Directors are not in session, such executive committee to consist of five members, two of whom shall be chosen by the Bankers, two of whom shall be chosen by the Mainlands, and the fifth member shall be chosen by the four so selected; and the Bankers and the Mainlands shall exercise all their rights and privileges of whatsoever kind and character the same may be in such manner as to bring about the selection, election and qualification of an executive committee in the manner in this paragraph prescribed.

Ninth: From the date of the purchase by the Bankers of said \$1,500,000 of Consolidated Bonds and until the number of Directors of the Oregon Company shall have been duly increased to eleven, and chosen in the manner aforesaid, the Mainlands shall exercise all and every right and privilege of whatsoever nature the same may be, in such manner as to secure to the Bankers representation upon the Board of Directors of the Oregon Company to the extent of two members; and so as to cause the creation of an executive committee to whom each and all of the powers of the Board of Directors, in so far as it may be permitted by law, shall be delegated during such times as the Board of Directors are not in session; such executive committee to consist of three

members, one of whom shall be selected by the Bankers, one by the Mainlands, and the third by mutual agreement of said parties.

Tenth: The Oregon Company shall not until the Bankers shall determine whether or not they will purchase the said \$1,500,000 of Consolidated Bonds issue or cause to be issued any bonds under any mortgage antedating the mortgage securing the Consolidated Bonds in addition to those now issued and outstanding under such prior mortgages, or increase the capital stock of the Oregon Company from the present amount thereof, or amend its certificate of Incorporation in any respect, and in the event that the Bankers shall purchase said \$1,500,000 of the Consolidated Bonds the Oregon Company shall not thereafter issue any further amount of bonds under any of said prior mortgages, or increase the capital stock of the Company from the present amount thereof, or amend its certificate of Incorporation in any respect, without the consent of the Bankers, and shall at the request of the Bankers take such proceedings as shall be requisite and necessary to close all of said prior mortgages under which according to their terms further bonds may then be issuable.

Eleventh: The Oregon Company and the Mainlands agree to exercise all of the rights and privileges vested in them, of whatsoever character the same may be, to the end that, if the Bankers shall so desire, there shall be substituted for the trustee or trustees whether individuals or corporations named in the Consolidated Mortgage or in any of the

mortgages securing the Prior Lien Bonds, other Trust Companies or individuals or both residing and doing business in the City of New York, such substituted trustee or trustees to be selected by the Bankers and to be satisfactory to the Mainlands. The Oregon Company and the Mainlands further agree that the Oregon Company shall appoint whatever corporations the Bankers may select to act respectively as Registrar and Transfer Agent of the Oregon Company's stock, and in the event of the organization of the new company as hereinafter provided the Mainlands agree to exercise all of the rights and privileges vested in them of whatsoever character the same may be to the end that the Bankers shall have the right to select the Registrar and Transfer Agent for the stocks of the New Company and the Trustee or Trustees under all Mortgages or Deeds of Trust to be made by it as contemplated herein.

Twelfth: Any moneys received by the Oregon Company from the sale of its securities shall be deposited in a bank or trust company in the City of New York to be named by the Bankers, and shall be paid out only upon the written certificate of some individual or corporation designated by the Bankers; and all expenditures of every kind of the Oregon Company amounting to \$5,000 or more shall be made only after the approval thereof by such engineer or other person as the Mainlands and the Bankers shall mutually select or such engineer or other person as the Board of Directors of the Oregon Com-

pany shall designate after the said Board shall have been increased and selected as hereinbefore provided. The compensation to be received by the engineer or other person acting in this capacity shall be paid by the Oregon Company.

Thirteenth: The Bankers and the Mainlands are negotiating for the purchase of the property that has been referred to generally between the parties hereto as the Swan Falls properties, comprising so much thereof as may include the water power plants, transmission lines and all other property rights and franchises associated with the generation, development and transmission of electric power. If such properties can be purchased at a price satisfactory to the Mainlands and to the Bankers, the Bankers, if they shall have purchased said \$1,500,000 face value of Consolidated Bonds, agree to purchase said properties and to sell, transfer and convey the same, for the consideration hereinafter provided, to a new company to be formed, capitalized, financed and to acquire such properties, as is hereinafter provided.

Fourteenth: In the event of the purchase of the said Swan Falls properties by the Bankers or in the event that the Bankers and the Mainlands shall, for any other reason, consider the organization thereof to be advisable, the Bankers, and the Mainlands agree to organize or cause to be organized under the Laws of the State of Maine, or of such other state as counsel for the said parties may determine to be advisable, a corporation to be called the Southern Idaho Power Company, or such other name as said parties

may hereafter agree upon. Such corporation hereinafter called the New Company shall have a capital stock of \$15,000,000 par value divided into 150,000 shares of the par value of \$100 each, of which \$5,000,000 thereof shall be seven per cent. non-accumulative preferred stock and \$10,000,000 thereof shall be common stock. Upon the organization of such corporation, the said parties agree to take or cause to be taken all such steps as may be requisite and necessary for the creation by the New Company of a mortgage covering all of the New Company's properties originally acquired and such as may thereafter be acquired to secure an issue of the New Company's first mortgage six per cent. bonds for the aggregate principal sum of \$20,000,000, maturing in not less than thirty (30) or more than forty (40) years from the date of such mortgage, and thereafter the said parties shall cause the New Company to acquire from the Bankers and the Bankers shall transfer and convey or cause to be transferred and conveyed to the New Company said Swan Falls properties by good and sufficient instruments of transfer in consideration of the New Company's issuing and transferring to the Bankers in payment for said property a sufficient amount of the New Company's said first mortgage six per cent bonds taken at eighty per cent. of the face value thereof to equal the amount of cash paid or required by the Bankers in purchasing said Swan Falls properties and \$2,500,000 face value of its preferred stock, and \$2,500,000 face value of its common stock, said pre-

ferred and common stock to be full paid and non-assessable in the hands of the Bankers. And in further consideration of the New Company's granting to the Bankers in writing subject to the right of termination hereinafter provided the right and option for a period of five (5) years from the date of the transfer to the New Company of the said Swan Falls properties to purchase from the New Company for cash at eighty per cent. (80%) of their face value and accrued interest the whole or any part of all of the said issue of first mortgage bonds of the New Company, except the bonds of said issue to be delivered to the Bankers as aforesaid in part payment of the Swan Falls properties, as may from time to time thereafter be authorized to be issued under and in accordance with the mortgage and deed of trust securing the same. Said option shall provide, however, that if at any time during the term thereof the New Company desires to negotiate or sell for its proper corporate purposes the whole or any part of the bonds so optioned, and the net earnings of the New Company for a period of twelve (12) consecutive months prior to the date on which the New Company may notify the Bankers of its desire to sell or otherwise negotiate said optioned bonds or any part thereof shall have aggregated a sum fifty per cent. (50%) greater than the interest charges during said period of twelve (12) months upon all of the bonds of the New Company then outstanding, both those herein referred to as its first mortgage bonds and those constituting a prior lien upon the whole or any

part of the New Company's properties, and upon such of the said optioned bonds as the New Company may desire to sell or otherwise negotiate the New Company may by notice to that effect in writing, specifying the aggregate face value of the optioned bonds sought to be sold or otherwise negotiated delivered to the Bankers at their office in the City of New York, limit the option period in respect to the bonds so specified to thirty (30) days after the delivery of such notice; and if the Bankers fail to exercise their option with respect to the bonds specified in such notice within said period of thirty (30) days, the said right and option in respect to the bonds so specified shall cease and determine, but only if the New Company shall within sixty (60) days after the lapse of said period of thirty (30) days sell or otherwise negotiate the bonds specified in such notice. But the said option of the Bankers in respect to the balance of said optioned bonds shall continue in full force and effect until and unless terminated by a similar notice or notices delivered to the Bankers during the option period; it being understood that such a notice may be given the Bankers whenever the New Company may desire to sell or otherwise negotiate said optioned bonds or any part thereof for its proper corporate purposes, and that whenever so given such notice shall serve except as hereinbefore prescribed to limit the option period with respect to the bonds therein specified. The New Company shall, as still further consideration for the transfer of the Swan Falls properties, to it by the Bankers, enter into an agreement in writing with

the Bankers to the effect that in the event of the consolidation or merger of the Oregon Company and the New Company being effected substantially in the manner and upon the terms hereinafter set forth, the New Company shall purchase from the Bankers any or all of the Prior Lien Bonds whenever such bonds are tendered to the New Company by the Bankers at call prices thereof, as specified in the mortgages or deeds of trust securing the same, payment for such bonds to be made by the New Company (except as hereinafter in this paragraph provided) in its said First Mortgage Bonds at eighty (80) per cent. of their face value and accrued interest, the first mortgage bonds so to be delivered to the Bankers to be taken from the bonds optioned to the Bankers as aforesaid. If, however, for any reason it may be impracticable or inadvisable for the New Company to pay for the Prior Lien Bonds so tendered by the Bankers in its said First Mortgage Bonds, the New Company shall upon such tender sell to the Bankers and the Bankers shall in that event purchase of the New Company an amount of its said optioned First Mortgage Bonds for cash at eighty (80) per cent. of their face value and accrued interest sufficient to realize the purchase price as hereinbefore fixed of the Prior Lien Bonds so tendered, and with the sum so realized shall thereupon purchase from the Bankers the Prior Lien Bonds so tendered.

The New Company shall agree to call for payment and redemption whenever the Bankers may request

all of the Prior Lien Bonds then outstanding and not theretofore tendered by the Bankers as hereinbefore provided, and upon the calling of such Prior Lien Bonds the Bankers agree to purchase from the New Company a sufficient amount of its said optioned First Mortgage Bonds for cash at eighty (80) per cent. of their face value and accrued interest to pay off and retire the Prior Lien Bonds so called for redemption.

All Prior Lien Bonds acquired by the New Company through the Bankers or otherwise shall be if the Bankers so request forthwith cancelled by the New Company, and when all of the Prior Lien Bonds issued under any of said Prior mortgages shall have been cancelled the New Company shall take such proceedings as are requisite and necessary to satisfy of record the mortgage securing such bonds and shall procure it to be so satisfied of record.

Fifteenth: The parties also agree that if the New Company shall acquire the Swan Falls property as hereinbefore provided, or if, for any other reason, the New Company be organized and such action shall be deemed by the Bankers or the Mainlands to be advisable, a consolidation or merger of all the Oregon Company's properties, rights, interests and franchises, with or into the New Company shall be effected either by the New Company's acquiring a majority or all of the issued and outstanding stock of the Oregon Company, or by the New Company's acquiring all of the properties, rights and franchises of the Oregon Company by conveyance and transfer.

Should such consolidation or merger of the Oregon Company with the New Company be undertaken, it shall be effected on such terms that each holder of shares of the preferred stock of the Oregon Company shall receive an equivalent number of shares of the preferred stock of the New Company, and so that each holder of shares of the common stock of the Oregon Company shall receive an equivalent number of shares of the common stock of the New Company.

If for any reason it is deemed advisable to organize the New Company, and to effect such merger or consolidation before sixty per cent. of the issued and outstanding stock of the Oregon Company shall have been deposited under the voting trust agreement, hereinbefore provided for, the Bankers and the Mainlands shall forthwith, after the purchase by the Bankers of the said \$1,500,000 of Consolidated Bonds, deposit all of the stock of the Oregon Company owned by them, both common and preferred, with the Guaranty Trust Company of the City of New York, and shall constitute said Trust Company by an instrument in writing executed by both of said parties, the form thereof to be hereafter agreed upon, the proxy of said parties to vote said stock in favor of said proposed consolidation or merger.

Sixteenth: The mortgage or deed of trust to be executed by the New Company, as aforesaid, shall be satisfactory in form to counsel to the Bankers, and shall, among other things, contain provisions enabling the New Company to purchase securities of

other companies and underlying securities and to pay therefor either in bonds of the New Company issued thereunder or to sell such bonds of the New Company and to use the proceeds thereof for such purpose. Such mortgage or deed of trust shall also contain a sinking fund provision so phrased that its effect will be to retire within the term of the said mortgage or deed of trust at least one-third of the bonds to be issued thereunder, the provisions for which sinking fund, however, shall not become operative until the year 1914, and shall provide that no more than \$10,000 will be required to be appropriated by the New Company for the purpose of the Sinking Fund during the first year when such payments are to commence, and that the sums required to be thereafter appropriated to the sinking fund shall be gradually increased to such extent as may be necessary to accomplish the retirement of said one-third of the said bonds by the date of the maturity thereof.

Seventeenth: Should it be for any reason impossible or, in the opinion of the Bankers, inadvisable to carry out the consolidation or merger of the Oregon Company with the New Company, as herein contemplated, the Oregon Company shall upon the request of the Bankers, purchase from the Bankers and the Bankers shall sell to the Oregon Company all of the stocks and bonds of the New Company owned by them at the cash cost thereof to the Bankers, with interest thereon at six per cent. (6%) per annum, payment therefor to be made in Consolidated Bonds at eighty per cent. (80%) of their face value and

accrued interest, and the Oregon Company shall, in such event, and at the request of the Bankers, likewise purchase from the Bankers all of the stocks of the New Company then outstanding and not originally owned by the Bankers, at cost prices thereof to the Bankers, payment therefor to be also made in Consolidated bonds at eighty per cent. (80%) of their face value, and accrued interest. The obligation of the Oregon Company herein expressed, to purchase all of the issued and outstanding stocks and bonds of the New Company is conditioned upon the New Company's having acquired through the Bankers, and at the time of such purchase owning, the said Swan River properties.

The Oregon Company and the Mainlands, in the event of the proposed consolidation of the Oregon Company with the New Company being abandoned, shall exercise all their rights and privileges of whatsoever kind and character the same may be, in such manner as to secure the insertion of a provision in the Mortgage and Deed of Trust securing the Consolidated Bonds, providing for a sinking fund to be created upon the same terms as the sinking fund herein prescribed for the First Mortgage Bonds of the New Company.

Eighteenth: In the event of the consolidation or merger of the Oregon Company and the New Company being effected, substantially in the manner herein contemplated, each and all the provisions of this agreement contemplating the purchase by the Oregon Company from the Bankers of the Prior Lien Bonds or contemplating the sale by the Oregon

Company to the Bankers of a sufficient amount of Consolidated Bonds to enable the Oregon Company to purchase the Prior Lien Bonds from the Bankers as herein provided, or providing for an option to the Bankers on any of the Consolidated Bonds for any other purpose, shall become void and of no further effect.

Nineteenth: All provisions of this agreement specifying the number of directors the Oregon Company shall have, when its Board shall have been increased as herein agreed; providing for a voting trust of its stock, the selection of voting trustees and the deposit of stock thereunder; the method of selecting directors; all provisions for an executive committee after the increase of the number of directors, its powers and the method of selecting its members; the right of the Bankers to choose a Trust Company to act hereafter as trustee under its mortgages; to select its registrar and transfer agent; providing for the deposit of moneys received from the sale of securities and limiting the right of the Oregon Company to pay out such or other moneys shall, *mutatis mutandis*, apply to the New Company in the same manner and to the same extent as though the New Company were specified in each of said provisions in the place and stead of the Oregon Company.

Twentieth: All of the parties hereto hereby agree to exercise all the rights and privileges of whatsoever character the same may be, and whether now vested in them or hereafter to be acquired, to the end that each and all the provisions of this agreement may be fully carried out in accordance with the full

intent and purpose of the parties hereto as hereinbefore expressed.

Neither the Bankers nor the Mainlands hereby personally agree that the Oregon Company or the New Company, if it shall be organized as herein contemplated, shall do and perform all or any of the covenants or agreements herein by it made, nor assume any liability for its non-performance, their only obligation being to exercise their several and all the rights and privileges vested or to be vested in each of them, to enable and cause either of the corporations herein mentioned to perform each and all of the respective covenants and agreements by each of said corporations to be performed hereunder.

Twenty-first: The New Company, should it be organized, financed, capitalized and acquire such properties as are herein contemplated, shall, at the request of the Bankers, exchange its said first mortgage bonds for consolidated bonds purchased by the Bankers hereunder, bond for bond, such exchange to be made at the par value of each of the bonds, and the Bankers shall transfer and deliver to the New Company all consolidated bonds of the Oregon Company acquired by them, and will accept in exchange therefor said first mortgage bonds of the New Company on the basis of exchange hereinbefore prescribed.

Twenty-second: In the event that the Bankers purchase the said \$1,500,000. face value of Consolidated Bonds, the Oregon Company will pay all expenses incurred by the Bankers, including the fees and expenses of engineers, counsel, attorneys and ac-

countants, connected with the examination of the business, property and affairs of the Oregon Company hereinbefore mentioned; and in the same event it will also pay any and all expenses involved in the carrying out of each and every provision of this agreement.

Twenty-third: All other agreements heretofore made between the parties hereto, or between the Bankers and the Oregon Company, are hereby terminated, and it is hereby especially declared that the rights, obligations and interests of the respective parties hereto, in and to the securities or properties of the Oregon Company, shall henceforth be governed solely by the provisions of this instrument.

Twenty-fourth: This agreement shall be binding on the heirs, executors, personal representatives, successors and assigns of the parties hereto.

IN WITNESS WHEREOF the Bankers and the Mainlands have hereunto set their hands and seals, and the Oregon Company has caused these presents to be executed by its duly authorized officer on the day and year first above written.

KISSEL, KINNICUTT & COMPANY,

By S. L. Fuller,

Member of firm.

IDAHO-OREGON LIGHT & POWER CO.,

By Wm. Mainland,

President.

Wm. Mainland.

In the Presence of:
Forsyth Wickes.

With respect to the foregoing contract, MR. CUMMINS read from the deposition of Samuel L. Fuller, taken in the cause on October 21, 1913, on behalf of respondents, in substance as follows:

Witness resides at Harrison, Westchester County, New York State; member of banking firm of Kissel, Kinnicutt & Company, 14 Wall Street, New York City; director of Liberty National Bank of New York City; member of Executive Committee and Board of Directors of Seaboard Air Line Railway; director Virginia Railway, of International Paper Company, and of other corporations.

The properties of the Power Company were first called to his attention the first part of 1911, when talking to a Mr. Cox in May or June of that year he saw a report made by J. G. White & Company, but was not interested until when later Mr. Cox got into communication with a Mr. Watson, who was then in the employ of his firm and the latter, with the approval of witness, sent one of the employes of a company in which witness was interested, to Boise, Idaho, who made an examination of the territory and properties of the Power Company, as a result of which the witness investigated the situation in more detail. A preliminary investigation was conducted during June, and the first contract entered into, with respect to his firm becoming financially interested in the properties, was with Messrs. William and Sinclair Mainland (who were then, and had been, from its organization, the Company's promoters and financial managers), on July

19th, 1911, and provided for a loan of approximately \$200,000, to be secured by Consolidated Mortgage Bonds. It was while this loan was in effect that further examination of the property was made, which resulted in the contract in question.

Subsequently a syndicate was formed to take over the holdings of Kissel, Kinnicutt & Company in the Power Company, and in other properties which they had acquired and which later became the properties of the Railway Company.

With respect to this syndicate Mr. Fuller testified as follows:

“The syndicate found itself owning a large interest in the Idaho-Oregon Company, and also, for the benefit of the Idaho-Oregon Company and for the benefit of the entire situation it had built up here an absolutely independent and self-sustaining and what was going to be a profitable enterprise, consisting of a power plant, and a large interurban and urban street railway system, and they therefore, as the Idaho-Oregon Company was in no position financially to take over the properties of the Railway Company, and the syndicate had two interests, thought it would be wise to turn over all of their interests in the Idaho-Oregon Company to the Idaho Railway Company, which they did, taking securities of the same class from the Idaho Railway for securities of the Idaho-Oregon Company, which they turned in to the Railway Company. In order to protect the stockholders of the Idaho-Oregon Company who had a security of questionable value in

the stock of the Idaho-Oregon Company, opportunity was voluntarily given them by the Idaho Railway Company to exchange their securities in the Idaho-Oregon Company for securities in the Idaho Railway Company. A circular was sent out to all the stockholders of record, and a very large proportion of the stockholders so exchanged their stock; in that way all of our interests, our stock interests were in the Idaho Railway Company, which in turn controlled the Idaho-Oregon Company."

Mr. Fuller further stated:

This syndicate was composed of a large number of individuals, perhaps fifty or one hundred; there were some interests in Montana, New York, Philadelphia, Boston and New England; each member had a stated participation. It was organized in 1911, for the purpose of doing such things as had been done in Idaho in connection with the Power and Railway properties. It was not a bond syndicate because not formed with any purpose of buying and selling bonds, but was a construction syndicate, sufficient capital being provided to carry matters through to conclusion. The syndicate was managed by Mr. Fuller's firm as syndicate managers; he had been more active in the Idaho situation than other members of his firm, but all the members participated in running the financial affairs of the syndicate. His firm was probably the principal interest in the syndicate although it was not the largest financial interest. There were eleven directors of the Railway Company, five or six of whom repre-

sented the financial interests of the syndicate. Those directors were Mr. Fuller; Mr. Richmond of Winslow Lanier & Company; Mr. Albert H. Wiggin, President of the Chase National Bank; John D. Ryan, President Montana Power Company, etc., Robert W. Watson, who was a director but had no connection with the syndicate, and Mr. Charles Sabin, Vice President of the Guaranty Trust Company, who was interested in the syndicate. The other directors were Mr. William Mainland, Mr. Sinclair Mainland, Mr. Fitch, connected with a bank in Milwaukee, Mr. Burtis and A. E. Thompson, who represented in a measure the Idaho-Oregon, being the original directors in that Company.

As descriptive of the general business of the Power Company and of the Railway Company, and the relations between the two, the following is abstracted from the testimony of O. G. F. Markhus, offered by the respondents:

Witness was General Manager of the Power Company from 1907 to and including practically the whole year of 1913. That Company became an operating Company in October 1908. Prior to that time it had commenced construction of the Ox Bow plant, and it then took over the operation of previously existing companies, known as Capital Electric Light, Motor & Gas Company, Boise-Payette Electric Power Company, Electric Power Company, Limited, Interstate Light & Water Company, and became an operating Company or distributor of electric current.

Kissel, Kinnicutt & Company first became interested in the property or securities of the Power Company in September, 1911, and persons designated by it commenced to participate in the management of the Power Company on December 1, 1911. Prior to that time William & S. Mainland of Oshkosh, Wisconsin, were the general operators of the property; they were replaced by Mr. Watson at the instance of the new interests, represented by Kissel, Kinnicutt & Company, but the Messrs. Mainland still remained directors of the Company and members of its Executive Committee, and Mr. William Mainland continued to be its President.

The Railway Company was organized in November 1911, and commenced business December 1, 1911, on or about which date it acquired the properties of the Swan Falls Power Company which owned a power plant at Swan Falls on the Snake River and transmission lines into the Silver City District, so-called, serving lines around Silver City and at Dewey and Murphy, and a transmission line from Swan Falls station through Nampa and Caldwell, where it was wholesaling power and from which it retailed power at Middleton; the Dewey Electric Company which distributed light and power to Nampa, the Boise Valley Railway Company, which had a railway system extending from Boise to Nampa, and the Boise & Interurban Railway Company, which had a railway from Boise to Caldwell, and the Caldwell Power Company, which distributed power at Caldwell, Idaho.

MR. CUMMINS offered and there was received in evidence the following:

MR. CUMMINS: I offer in evidence, and will read into the record, certain parts of the so-called consolidated mortgage, being the mortgage originally made to the Windsor Trust Company of New York and Marmaduke Tilden, the trustee afterwards being changed to Banker's Trust Company and F. N. B. Close. From the first page:

"Whereas, the said Company now owns the properties hereinafter described and may, from time to time, acquire other properties, and desires to improve, extend, enlarge, equip and develop the properties now owned, as well as those which may be hereafter acquired by it; and,

"Whereas, the Company, as hereinafter more particularly set forth, has acquired certain of its properties subject to certain liens, and has issued certain bonds secured by mortgage upon its properties, and desires to provide for the payment of said liens and the refunding of said bonds, and for funds for its other corporate purposes."

On page 30, under Article II, entitled, "Issue of Bonds":

"The Trustee Company shall authenticate the said bonds and deliver the same as follows:

"Section 1. Seven Million Dollars (\$7,000,000.00), par value, of said \$1,000 bonds shall be reserved to be issued and delivered for the purposes of refunding, redeeming, purchasing, taking up, retiring or

paying at, before or after maturity any and all bonds now issued or hereafter to be issued by the Company under and pursuant to the terms of a certain Indenture dated April 1st, 1907, between the Company and the State Bank of Chicago, as Trustee, which last mentioned bonds are hereinafter called "Underlying bonds," and the Indenture securing them the "Underlying mortgage," under which Indenture the issue of \$7,000,000. of bonds was authorized, but only two million seven hundred and ninety-nine thousand dollars (\$2,799,000.00) of bonds have heretofore been issued and are now outstanding. In the event that the said Indenture shall be closed and the Company shall waive and release its right to issue further bonds thereunder, before the entire amount therein and thereby contemplated shall have been issued, only such an amount of the above mentioned \$7,000,000 of bonds of this issue shall thereafter be reserved to be issued and delivered for the purpose of refunding, redeeming, purchasing, taking up, retiring or paying at, before or after maturity all of the bonds theretofore issued under said Indenture of April 1st, 1907, as shall equal at the par value thereof the total amount, par value, of bonds theretofore issued thereunder.

"If, at the time when said Indenture of April 1st, 1907, shall be closed, the bonds, liens or obligations, hereinafter in this section mentioned, or any of them, shall be still outstanding and unpaid, in addition to the aggregate of bonds of this issue then required to be reserved for the refunding of the bonds issued

under said Indenture of April 1st, 1907, as hereinbefore provided, there shall also be reserved to be issued and delivered, for the purpose of paying said bonds, liens or obligations hereinafter in this section mentioned, the following amount of bonds of this issue, or so much thereof as will equal, at par, the amount of said bonds, liens and obligations then outstanding, viz., Four hundred and eighty-eight thousand dollars (\$488,000.00), par value of the \$1,000 bonds for the purpose of refunding, redeeming, purchasing, taking up, retiring or paying at, before or after, maturity, four hundred and eighty-eight thousand dollars (\$488,000.00), par value, of the bonds of the Boise-Payette River Electric Power Company, a corporation organized under the laws of West Virginia and doing business in the State of Idaho, now outstanding; Sixteen thousand dollars (\$16,000.00), par value, of the \$1,000 bonds for the purpose of refunding, redeeming, purchasing, taking up, retiring or paying at, before or after, maturity, sixteen thousand dollars (\$16,000.00), par value, of bonds of the Electric Power Company, Limited, a corporation organized under the laws of the State of Idaho and doing business at Boise in said State; Thirty-five thousand dollars (\$35,000.00), par value, of the \$1,000 bonds for the purpose of refunding, redeeming, purchasing, taking up, retiring or paying at, before or after maturity, thirty-five thousand dollars (\$35,000.00), par value, of bonds of the Interstate Light & Water Company, a corporation organized and existing under the laws

of the State of Washington. Any and all bonds of this issue, not required to be reserved and to be issued and delivered for any of the purposes in this section provided, may be issued, delivered and used, by the Company for its general corporate purposes as described in Subdivision (b) of Section Two (2) of this Article.”

MR. MACLANE: I have no objection to that. I suppose it is understood, to identify this at this time, that these clauses which have just been read into the record are from the mortgage securing the so-called consolidated or second mortgage bonds, originally purchased by Kissel, Kinnicutt & Company, and held by the Railway Company prior to the exchange involved in this case?

MR. CUMMINS: The interveners now offer page two of the monthly report of operations of Idaho Railway, Light & Power Company, for December 1912, which was introduced as Exhibit 4, Fuller's Cross-Examination. It shows the gross earnings for the month of December 1912, and for the twelve months then ending; also the operating expenses, the net from operation, taxes, net from operation and taxes, non-operating revenue, railway rental, amount available for fixed charges, the amount of interest, rental of joint facilities, total fixed charges, surplus, and construction account. It is offered for the purpose of showing the condition of the Railway Company in 1912, as establishing a motive, or tending to establish a motive, for the transaction which is in issue here. I might say in this connec-

tion that I expect to offer, for the same reasons, another sheet of the same report, and corresponding sheets of the same months of the Idaho-Oregon for the purpose of showing the conditions of these two companies at that time.

To which said offer said respondents, by their counsel, duly objected on the ground that the same was irrelevant, immaterial, not germane to the issues on trial, nor within the allegations which the respondents were by the order of the Court directed to answer, but involves matters entirely foreign thereto, and which respondents were expressly excepted by the Court's order from answering, which said objection was by the Court overruled, in the following language:

"This is somewhat remote but I think perhaps I shall let it go in, it may have some bearing upon the good faith and reasonableness of the transaction. The objection will be overruled."

To which said ruling respondents, by their counsel, duly excepted, and still except, and which said exception was by the Court allowed.

Intervener's Exhibit No. 5.

RE 718 BONDS

6-22-14

RESULTS OF OPERATION.

DECEMBER, 1912.

IDAHO RAILWAY LIGHT AND POWER COMPANY.

December, 1912	Items	12 Months
\$18,397.09	Gross Earnings (Light & Power) ..	\$165,471.71
5,936.60	Operating Expenses	47,428.79
12,460.49	Net from Operation	118,042.92
1,726.10	Taxes (Act.)	6,406.10
10,734.39	Net from Opera- tion & Taxes	111,636.82
9,781.52	Non-operating Revenue	44,898.43
7,270.81	Railway Rental	89,604.49
27,786.72	Available for Fixed Charges	246,139.74
	<i>Fixed Charges</i>	
27,606.37	Interest	230,369.74
310.75	Rental of Joint Facilities	1,243.00
27,917.12	Total Fixed Charges .	231,612.74
130.40	Surplus	14,527.00
64,787.59	Construction	440,235.98

(a) The amount shown for construction expenditures does not include discount on bonds, \$180,-

000., which item is included, however, in the statement on page 7.

Interest during construction is included as follows:

	December	12 Months
Boise-Nampa Reconstruction	\$1,231.44	\$5,273.89
Swan Falls Installation.....	90.94	143.13
Total	<u>\$1,322.38</u>	<u>\$5,417.02</u>

(b) The amount shown for railway rental represents the net earnings of the Traction Company after deducting operating expenses and taxes.

MR. CUMMINS: (Continuing reading Fuller Deposition). Q. This report shows earnings for twelve months of \$165,471.71, and net from operations and taxes, \$111,636.82; non-operating revenue \$24,898.43; railway rental \$89,604.49, making available for fixed charges \$246,139.74. Will you state the character and from what source derived was the non-operating revenue of nearly \$45,000?

To which question counsel for respondents objected on the ground that the same was irrelevant and immaterial, and not germane to the issues on trial, nor within the allegations which the respondents were directed to answer, which said objection was by the Court overruled, and to which said ruling the said respondents, by their counsel, duly excepted and now except, and which said exception was allowed.

A. "I presume that is the income from the Idaho-Oregon securities held by the Railway Company." Such second mortgage bond as the Railway held at

that time. This interest was paid in November 1912, but not in May 1913. The item \$86,604.49, designated railway rental is the net earnings of the Railway Company, which at that time was only partially built, interurban street railway lines in course of construction; The gross earnings less operating expenses and taxes; that is the ordinary expenses of operation of the traction property, the company being charged with current furnished by the Railway Company at a price of one and one-half cents per kilowatt hour.

The Power Company and the Railway exchanged current at one cent per kilowatt hour, each supplying the demands of the other and there being no charge for readiness to serve. On December 31, 1912, the interest bearing capital charges outstanding against the Railway Company were \$7,361,000. Most of it at five per cent. In arriving at the Railway rental of \$89,000, no fixed charges were deducted for capital and the Traction Company had no charges except operating charges, taxes, reserves for accidents, and things of that kind.

Mr. CUMMINS: "I have heretofore offered sheet two of the monthly operating report of the Idaho Railway, Light & Power Company for December 1912. I now desire to offer sheet eight of the same report, showing the liabilities of the Company. It is the balance sheet * * * * as of December 31, 1912."

To which offer respondents, by their counsel, then and there objected, on the ground that the same is irrelevant and immaterial, and not germane to the issues on trial, which said objection was by the Court overruled, and to which said ruling the respondents, by their counsel, duly excepted, and still except, and which said exception was by the Court allowed.

INTERVENERS' EXHIBIT NO. 27.
Re 718 Bonds.

CONDENSED GENERAL BALANCE SHEET.

Compared with Previous Month.

IDAHO RAILWAY LIGHT AND POWER COMPANY.

Items.	December 31st	November 30th	Increase
Property, Plant and Equipment	\$11,605,917.98	10,726,623.50	879,294.48
Additions since January 1st.....	620,235.98	545,448.39	74,787.59
Securities Owned	11,119,410.00	2,557,010.00	8,562,400.00
Current and Working Assets:			
Cash	57,335.42	208,067.53	150,732.11
Petty cash	800.00	800.00	0
Special Coupon Deposit Reserve	34,908.32	0	34,908.32
Consumers' Accounts Receivable	23,006.94	23,154.51	147.57
Other Accounts Receivable	4,348.65	6,163.07	1,314.42
Interest Receivable Accrued on I.-O. Bonds	15,720.00	7,860.00	7,860.00
Interest Receivable Accrued on I.-O. Notes	1,959.77	1,064.44	895.33
Notes Receivable	220,000.00	125,000.00	95,000.00
Idaho Traction Company Rental Account.	12,256.64	15,271.08	3,014.44

Idaho Traction Company (working capital)	22,981.29	22,679.55	301.74
Merchandise & Supplies	5,661.61	5,453.81	207.80
Prepaid Expenses	646.89	1,328.13	681.24
	<hr/>	<hr/>	<hr/>
Boise Railroad Contract Forfeiture Account.	399,625.53	416,842.12	17,216.59
Sinking Fund, Boise & Interurban Bonds.....	0	3,626.75	3,626.75
Sinking Fund, Boise Railroad Bonds	6,862.78	6,500.00	362.78
Deposit to Retire Boise Valley Bonds.....	5,000.00	0	5,000.00
Germanatown Trust Company, Trustee.....	6,100.00	6,100.00	0
Bond Discount Suspense	500.00	0	500.00
The Cleveland Construction Company	0	3,978.16	3,978.16
Kissel, Kinnicutt & Company, Bankers.....	40,000.00	0	40,000.00
Items in Suspense	104.17	0	104.17
	<hr/>	<hr/>	<hr/>
Total Assets	23,803,756.44	14,266,766.87	9,536,989.57
Common Stock (Authorized \$20,000,000) ...	12,555,100.00	5,881,100.00	6,674,000.00
Preferred Stock Non-cum, 6% (Auth. \$10,000,000)	3,521,400.00	1,373,000.00	2,148,400.00
1st Mortgage 5% Bonds (Cert. \$6,500,000) ..	5,893,000.00	5,843,000.00	50,000.00
Boise Valley 1st Mortgage 5% Bonds.....	6,100.00	7,300.00	1,200.00

INTERVENERS' EXHIBIT NO. 27—(Continued).

Items.	December 31st	November 30th	Increase
Boise & Interurban 1st Mortgage 5% Bonds..	1,073,000.00	1,073,000.00	0
Boise Railroad 1st Mortgage 5% Bonds.....	389,000.00	0	389,000.00
Current and Accrued Liabilities:			
Accounts Payable	120,533.42	49,398.47	71,134.95
Note Payable	180,000.00	0	180,000.00
Consumers' Deposits	485.80	490.30	4.50
Idaho-Oregon Light & Power Co.....	10,246.95	6,076.54	4,170.41
Idaho Traction Co. Construction Account..	10,018.03	5,156.45	4,861.58
Taxes Accrued	0	2,998.55	2,998.55
Interest Accrued on Bonds	39,792.49	9,388.74	30,403.75
Suspense Account, B. V. Bond Purchase...	882.79	0	882.79
	<hr/>	<hr/>	<hr/>
Pierce Park Subdivision (sale of Lots)	361,959.48	73,509.05	288,450.43
Deficit—Dec. 31, 1911 (Adjusted) 2,281.64..	377.25	377.25	0
Surplus—Current Yr. (Adj.) 12 Mos.			
6,101.35	3,819.71	15,480.57	11,660.86
	<hr/>	<hr/>	<hr/>
Total Liabilities	23,803,756.44	14,266,766.87	9,536,989.57

(a) The following items have been charged to Surplus:

The Harmon Agency—Liability Insurance.....	\$3,104.81	(Surplus Dec. 31st)
Bond Discount Suspense	4,160.95	(Surplus Cur. Year)
Boise Railroad Forfeiture Account.....	3,626.75	(Surplus Cur. Year)
Crane Falls Suspense Account.....	637.95	(Surplus Cur. Year)
Total	<u>\$11,530.46</u>	

MR. CUMMINS: "I also offer sheet two of the monthly operating report of September 1912, of the Idaho Railway, Light & Power Company."

To which offer respondents, by their counsel, then and there duly objected, on the ground that the same was irrelevant, immaterial and not germane to the issues involved, which said objection was by the Court overruled, and to which ruling respondents, by their counsel, then and there excepted, and still except, and which said exception was by the Court allowed.

INTERVENORS' EXHIBIT NO. 28.
Re 718 Bonds.

RESULTS OF OPERATION.

September, 1912.

IDAHO RAILWAY LIGHT AND POWER COMPANY.

September, 1912	Items.	9 Months
\$15,650.54	Gross Earnings (Light & Power)	\$111,952.53
4,062.58	Operating Expenses	30,845.38
11,587.96	Net from Operation	81,107.15
500.00	Taxes (Est.)	3,680.00
11,087.96	Net from Operation & Taxes	77,427.15
40.00	Non-operating Revenue	165.00
11,054.63	Railway Rental	57,276.50
22,182.59	Available for Fixed Charges	134,868.65
	<i>Fixed Charges.</i>	
18,472.93	Interest	127,724.99
310.75	Lease of Transmission Line	310.75
18,783.68	Total Fixed Charges	128,035.74
3,398.91	Surplus	6,832.91
69,637.55	Construction	267,463.71

(a) The deduction for interest is subject to adjustment upon receipt of full information.

The amount shown above is made up as follows:

6%	from Jan. 1 on	\$ 312,500	Dewey purchase notes.
6%	from Jan. 1 on	1,180,000	Swan Falls purchase notes.
5%	from Mar. 1 on	200,000	I. R. L. & P. Bonds (Caldwell purchase).
5%	from Apr. 1 on	1,073,000	B. & I. bonds.
5%	from Apr. 1 on	949,500	B. V. bonds.
5%	from June 27 on	200,000	I. R. L. & P. bonds (issued June 27).
5%	from Aug. 8 on	200,000	I. R. L. & P. bonds (issued Aug. 8).
5%	from Sep. 19 on	50,000	I. R. L. & P. bonds (issued Sep. 19)

(b) The amount shown for construction expenditures does not include discount on bonds, \$90,000, which item is included, however, in the statement on page 7.

MR. CUMMINS: I offer sheet eight of the same report.

To which said offer counsel for respondents then and there duly objected on the ground that the same is irrelevant and immaterial and not germane to the issues involved, which said objections were by the Court overruled, to which ruling said respondents, by their counsel then and there duly excepted and still except, and which said exception was by the Court allowed.

INTERVENERS' EXHIBIT NO. 29.
Re 718 Bonds.

CONDENSED GENERAL BALANCE SHEET.

Compared with Previous Month.

IDAHO RAILWAY LIGHT AND POWER COMPANY.

Items.	September 30th	August 31st	Increase
Property, Plant & Equipment.....	\$3,754,455.55	3,754,455.55	0
Additions since January 1.....	357,463.71	277,826.16	79,637.55
Securities Owned	793,800.00	793,800.00	0
Current and Working Assets:			
Cash	166,424.86	24,422.75	142,002.11
Petty Cash	600.00	400.00	200.00
Consumers' Accounts Receivable	33,050.11	32,892.59	157.52
Other Accounts Receivable	5,329.62	2,635.23	2,694.39
Idaho Traction Rental Account	30,451.50	46,221.87	15,770.37
Merchandise and Supplies	4,885.74	4,737.06	148.68
Prepaid Expenses	1,918.37	132.70	1,785.67
	<u>242,660.20</u>	<u>111,442.20</u>	<u>131,218.00</u>
	..		

Kissel, Kinnicutt & Co. Account Current.....	0	161,861.11	161,861.11
Boise Railroad Contract Forfeiture Account...	3,626.75	0	3,626.75
Items in Suspense.....	837.91	797.91	40.00
Total Assets	5,152,844.12	5,100,182.93	52,661.19
Capital Stock Common	2,808,600.00	2,808,600.00	0
Capital Stock, Non-cumulative 6% Preferred...	50,000.00	50,000.00	0
First Mortgage 5% Gold Bonds	650,000.00	600,000.00	50,000.00
Current and Accrued Liabilities:			
Notes Payable	1,492,500.00	1,492,500.00	0
Accounts Payable	6,533.10	3,863.18	2,669.92
Consumers' Deposits	423.25	417.25	6.00
Idaho-Oregon Light & Power Co.....	4,895.75	5,210.80	315.05
Idaho Traction Co. Construction Account....	16,187.52	13,584.04	2,603.48
Taxes Accrued	3,523.55	3,023.55	500.00
Interest Accrued on Notes	73,460.48	65,997.98	7,462.50
Interest Accrued on Bonds	13,333.33	10,000.00	3,333.33
Interest Accrued on Railway Bonds	23,737.50	42,135.40	18,397.90
	1,634,594.48	1,636,732.20	2,137.72

INTERVENERS' EXHIBIT NO. 29—(Continued.)

Items.	September 30th	August 31st	Increase
Crocker & Wickes Suspense Account.....	1,400.00	0	1,400.00
Pierce Park Subdivision (sale of Lots).....	186.95	186.95	0
Surplus:			
As at December 31, 1911, .....1,229.78			
Surplus—Current year (9 mos) ..6,832.91..	7,062.69	4,663.78	2,398.91
Total Liabilities	5,152,844.12	5,100,182.93	51,661.19

(a) The above balance sheet is subject to correction upon receipt of complete information as to properties purchased and securities issued.

(b) The item of "Securities Owned" represents the cost of \$1,322,600 par value Boise & Interurban Railway Company stock.

MR. CUMMINS: I offer sheet two of the monthly operating report of the Idaho-Oregon Light & Power Company for the month of September 1912; sheet eight of the same report; and sheet two and eight of the report of said Company for December 1912.

To which said offer and to each part thereof, respondents, by their counsel, duly objected on the ground that the same was irrelevant, immaterial, and not germane to the issues involved in the cause, which respondents were directed to answer, and which said objection was by the Court overruled, and the said sheets, and each of them were admitted by the Court "for the purpose of showing the status of the business of the Idaho-Oregon Company as bearing upon the real value of the bonds," to which said ruling of the Court the said respondents, by their counsel, then and there duly excepted, and still except, and which said exception was by the Court allowed.

Said pages from said reports were thereupon introduced in evidence and are as follows:

INTERVENERS' EXHIBIT NO. 30.

Re 718 Bonds.

RESULTS OF OPERATION.

September, 1912.

IDAHO OREGON LIGHT AND POWER COMPANY.

%	Inc.	September	1912	Items.	9 Months		% Inc.
		1911			1912	1911	
8.8	30,126.39	\$32,795.21		Gross Earnings.....	\$297,270.73	253,654.62	17.2
46.6	8,431.23	12,359.98		Operating Expenses.....	90,598.60	75,791.32	19.5
5.8	21,695.16	20,435.23		Net Earnings.....	206,672.13	177,863.30	16.2
....	101.25	1,672.21		Purchased Power.....	26,863.46	212.61	....
13.1	21,593.91	18,763.02		Net from Operation.....	179,808.67	177,650.69	1.2
2.4	1,025.45	1,000.00		Taxes (Est.).....	10,500.00	9,229.05	13.8
13.6	220,568.46	17,763.02		Net from Operation and Taxes	169,308.67	168,421.64	.5
....	40.00	575.28		Non-operating Revenue....	4,781.62	360.00	....
54.2	153.20	70.05		Outside Operations, (Net) .	1,197.75	504.56	137.5
....	0	310.75		Income from Lease of Line.	310.75	0	....

11.3	20,761.66	18,719.10	Available for Fixed Charges	175,598.79	169,286.20	3.5
			<i>Fixed Charges.</i>			
31.3	7,197.11	9,449.95	Interest	76,196.08	64,773.99	17.6
9.3	762.50	833.33	Rental, Barber Plant.....	7,499.97	6,862.50	9.3
29.2	7,959.61	10,283.28	Total Fixed Charges.....	83,696.05	71,636.49	16.8
36.5	12,802.05	8,435.82	Surplus (Ex. Cont. Interest)	91,902.74	97,649.71	6.2
13.9	12,535.11	14,284.23	Contingent Interest.....	128,558.07	112,815.99	13.9
	266.94	5,848.41	Surplus	36,655.33	15,166.28	
	79,923.55		Construction	385,359.12		

(a) The item of Interest under Fixed Charges is that part of the total interest charge which, in any event, will be a deduction from Surplus. The balance of the interest paid has been deducted as a separate item. The second item of interest is the interest charge on \$2,856.846 bonds issued in connection with the Ox Bow development.

(b) The items included under Construction are shown on page 7a. Bond discount, \$85,000, is not included above.

INTERVENERS' EXHIBIT NO. 31.

Re 718 Bonds.

CONDENSED GENERAL BALANCE SHEET

Compared with Previous Month.

IDAHO OREGON LIGHT AND POWER COMPANY.

Items.	September 31st	August 31st	Increase
Property, Plant & Equipment	\$14,679,488.77	14,679,488.77	0
Additions since January 1st.....	470,359.12	390,435.57	79,923.55
Suspense Account—Interest on Ox Bow Development	128,558.07	114,273.84	14,284.23
Investments	17,725.00	17,725.00	0
Current and Working Assets:			
Coupon Special Deposits	20,181.65	110,266.63	90,084.98
Cash	21,016.78	49,420.59	28,403.81
Petty Cash	3,800.00	3,800.00	0
Consumers' Accounts Receivable	77,897.44	75,387.73	2,509.71
Miscellaneous Accounts Receivable	6,428.82	7,192.76	763.94
Notes Receivable	47,020.78	47,020.78	0
Interest Receivable Accrued	6,447.29	6,108.84	338.45
Merchandise & Supplies	51,116.18	48,767.73	2,919.48

Suspense Account—Disb. by K. K. & Co...	0	3,319.48	3,919.48
Prepaid Expenses	5,808.24	3,920.40	1,887.84
	<u>239,717.18</u>	<u>355,804.94</u>	<u>116,087.76</u>
Sinking Fund, Boise-Payette River El. Power Co.	1,762.57	1,862.57	100.00
Total Assets	<u>15,537,610.71</u>	<u>15,559,590.69</u>	<u>21,979.98</u>
Capital Stock, Common	7,500,000.00	7,500,000.00	0
Capital Stock, Preferred	2,500,000.00	2,500,000.00	0
Bonds of Idaho-Oregon Co.	4,232,000.00	4,232,000.00	0
Bonds of Underlying Companies	534,000.00	534,000.00	0
Boise Railroad Contract Forfeiture Account .	3,626.75	0	3,626.75
Current and Accrued Liabilities:			
Accounts Payable	111,256.47	80,078.20	31,178.27
Wm. & S. Mainland	12,651.73	12,651.73	0
Consumers' Deposits	4,164.55	4,024.55	130.00
Bond Interest Accrued	43,915.83	110,266.65	66,350.82
Taxes Accrued	8,162.65	7,162.65	1,000.00
Preferred Dividends Accrued	99,377.04	95,462.04	3,915.00
	<u>279,528.27</u>	<u>309,655.82</u>	<u>30,127.55</u>

INTERVENERS' EXHIBIT NO. 31—(Continued).

Items.	September 31st	August 31st	Increase
Reserve for Accidents & Damages	9,000.00	9,000.00	0
Surplus:			
As at December 31, 1911 (Adjusted)	422,787.95	422,787.95	0
Deficit—Current Year (9 Mos.) 36,655.33			
Preferred Dividend, (9 Mos.) 35,235.00	71,890.33	62,126.92	10,074.16
Contingent Surplus—Ox Bow Interest	350,897.62	360,661.03	10,074.16
	128,558.07	114,273.84	14,284.23
Total Liabilities	15,537,610.71	15,559,590.69	21,979.98

INTERVENERS' EXHIBIT NO. 32.
Re 718 Bonds.

RESULTS OF OPERATION.

December, 1912.

IDAHO OREGON LIGHT AND POWER COMPANY.

	December.		Items.	12 Months.		% Inc.
	1911	1912		1912	1911	
	38,678.94	\$38,673.72	Gross Earnings	\$398,105.75	358,490.73	11.1
13.5	10,507.93	11,926.15	Operating Expenses	124,411.81	104,776.04	18.7
5.1	28,171.01	26,747.57	Net Earnings	273,693.94	253,714.69	7.9
15.4	1,559.75	1,319.10	Purchased Power	30,752.43	2,710.86	. .
4.4	26,611.26	25,428.47	Net from Operation	242,941.51	251,003.83	3.2
77.9	1,025.45	247.37	Taxes (Act.)	12,247.37	12,305.40	.7
1.6	25,585.81	25,181.10	Net from Operation and Taxes.....	230,694.14	238,698.43	3.2
....	40.00	392.49	Non-operating Revenue	3,542.73	480.00	....
....	190.62	348.65	Outside Operations (Net) ..	1,950.29	1,092.71	78.5
....	0	310.75	Income from Lease of Lines.	1,243.00	0	....

INTERVENERS' EXHIBIT NO. 32—(Continued.)

% Inc.	December. 1911	1912	Items.	12 Months.		% Inc.
				1912	1911	
1.6	25,816.43	26,232.99	Available for Fixed Charges.	237,430.16	240,271.14	1.2
			<i>Fixed Charges</i>			
46.3	7,197.11	10,531.38	Interest	106,780.65	86,365.32	24.7
....	904.16	904.16	Rental, Barber Plant	10,141.62	9,291.66	9.1
41.3	8,101.27	11,435.54	Total Fixed Charges	116,922.27	95,656.98	22.2
16.5	17,715.16	14,797.45	Surplus (Ex. Cont. Interest)	120,507.89	144,614.16	16.7
13.9	12,535.11	14,284.23	Contingent Interest	171,410.76	150,421.32	13.6
....	5,180.05	513.22	Surplus	50,902.87	5,807.15	....
		62,811.03	Construction	590,539.70		

- (a) The item of interest under Fixed Charges is that part of the total interest charge which, in any event, will be a deduction from Surplus. The balance of the interest paid has been deducted as a separate item. The second item of interest is the interest charge on \$2,856,846 bonds issued in connection with the Ox Bow development.
- (b) The items included under Construction are shown on page 7a. Bond discount, \$90,000., is not included above.

INTERVENERS' EXHIBIT NO. 33.
Re 718 Bonds.

CONDENSED GENERAL BALANCE SHEET.

Compared with Previous Month.

IDAHO OREGON LIGHT AND POWER COMPANY.

Items.	December 31st	November 30th	Increase
Property, Plant & Equipment	\$14,649,488.77	14,679,488.77	30,000.00
Additions since January 1st	680,539.70	612,728.67	67,811.03
Suspense Account—Interest Ox Bow development	171,410.76	157,126.53	14,284.23
Investments	17,725.00	17,725.00	0
Current and Working Assets: Cash	60,216.34	30,392.75	29,823.59
Petty Cash	4,050.00	4,500.00	450.00
Consumers' Accounts Receivable	76,241.39	77,091.55	850.16
Miscellaneous Accounts Receivable	18,712.84	5,377.54	13,335.30
Notes Receivable	47,020.78	47,020.78	0
Interest Receivable Accrued	3,931.08	7,125.01	3,193.93
Merchandise & Supplies	47,881.37	49,162.63	1,281.26

INTERVENERS' EXHIBIT NO. 33—(Continued).

Items.	December 31st	November 30th	Increase
Prepaid Expenses	379.28	1,998.44	1,619.16
Kissel, Kinnicutt & Company Bankers	0	234.17	234.17
Bates & Rogers Settlement Account	258,433.08	222,902.87	35,530.21
Sinking Fund, Boise-Payette River El. Power Company,	106,102.72	0	106,102.72
Total Assets	1,762.57	1,762.57	0
	15,885,462.60	15,691,734.41	193,728.19
Capital Stock, Common	7,500,000.00	7,500,000.00	0
Capital Stock, Preferred	2,500,000.00	2,500,000.00	0
Bonds of Idaho-Oregon Company	4,257,000.00	4,232,000.00	25,000.00
Bonds of Underlying Companies	534,000.00	534,000.00	0
Boise Railroad Contract Forfeiture Account.	3,626.75	3,626.75	0
Current and Accrued Liabilities:			
Accounts Payable	91,510.24	55,091.67	36,418.57
Notes Payable	304,000.00	201,000.00	103,000.00
Wm. & S. Mainland	2,750.00	5,481.46	2,731.46

Consumers' Deposits	4,302.85	4,324.05	21.20
Bond Interest Accrued	62,898.32	38,864.15	24,034.17
Interest Accrued on Notes	2,289.77	3,213.33	923.56
Taxes Accrued	150.00	8,961.01	8,811.01
Preferred Dividends Accrued	111,122.04	107,207.04	3,915.00
	<hr/>	<hr/>	<hr/>
Commercial Mining Co. (Mormon Basin Line Contract)	579,023.22	424,142.71	154,880.51
Reserve for Accidents & Damages	10,000.00	0	10,000.00
Surplus: As at December 31, 1911 (Adjusted)	9,000.00	9,000.00	0
Deficit—Current Year (12 Mos.)	419,284.74	422,787.95	3,503.21
Preferred Dividend (12 Mos.)	97,832.87	90,949.53	6,933.34
	<hr/>	<hr/>	<hr/>
Contingent Surplus—Ox Bow Interest	321,401.87	331,838.42	10,436.55
	171,410.76	157,126.53	14,284.23
	<hr/>	<hr/>	<hr/>
Total Liabilities	15,885,462.60	15,691,734.41	193,728.19

MR. CUMMINS: I offer a sheet showing the gross earnings, the operating expenses, and net earnings of the Idaho-Oregon Company for each year from 1907 to 1912, inclusive, and ask that it be marked Interveners' Exhibit No. 40, re 718 bonds. These figures are derived from audits of the books of the Company, made by Marwick, Mitchell, Peat & Company, chartered accountants; first, an audit for the four years ending December 31, 1910, dated New York, May 8, 1911, addressed to William Mainland, Esq., President of the Idaho-Oregon Light & Power Company. A part of the report reads as follows: "The balance sheet submitted, attached to our report of even date, in our opinion is a full and fair presentation of the financial position of the Company as of December 31, 1910, excluding any contingent liabilities or uncompleted contracts. * * * The operations of the Company during the period of four years under review, after charging off all expenses applicable thereto, including maintenance and renewals, but before making provision in respect of depreciation of the physical properties, the amount of which, however, would be of relatively minor importance, during this period, resulted as follows."

MR. MACLANE: The opinions of the accountants as to whether these are proper or otherwise, except as stated in the audit themselves, it would seem to me would hardly,—We don't want to permit the inference to be drawn that we are bound by the running commentaries of the auditors on their own audit.

MR. CUMMINS: Not at all. The audit for the year 1911 is addressed to the Board of Directors of the Idaho-Oregon Light & Power Company, and is dated May 8, 1912. The audit for the year 1912 is addressed to the Board of Directors of the Idaho-Oregon Light & Power Company, and is dated April 3, 1913. I understand that it is admitted, subject only to the general objection as to its materiality.

To which said offer respondents, by their counsel, then and there objected on the ground that the same was irrelevant and immaterial to the issues involved, which said objection was by the Court overruled and to which said ruling respondents, by their counsel excepted, and still except, and which said exception was by the Court allowed.

Thereupon, the said Exhibit was introduced in evidence, and is as follows:

INTERVENERS' EXHIBIT NO. 40.
IDAHO-OREGON LIGHT & POWER COMPANY
BOISE, IDAHO.
STATEMENT OF EARNINGS EXTRACTED
FROM MARWICK, MITCHELL, PEAT &
COMPANY AUDITS

Year	Gross Earnings	Operating Expenses	Net Earnings
1907....	189,045.89	98,586.48	90,459.41
1908....	196,416.16	83,438.80	112,977.36
1909....	215,579.57	73,531.31	142,048.26
1910....	247,041.43	82,526.01	214,515.42
1911....	361,297.47	128,399.62	232,897.85
1912....	405,210.21	189,318.10	215,892.11

MR. CUMMINS offered and there was received in evidence the following:

MR. CUMIMNS: (Reading) "Minutes of an adjourned meeting of the executive committee of the Idaho-Oregon Company, held at Boise, Idaho, on August 30, 1912. Present Messrs. S. L. Fuller, William Mainland, and R. W. Watson, and absent Messrs. Sinclair Mainland and Albert H. Wiggin. In addition to the members of the committee there were present R. L. Bacon, H. F. Dickey, J. F. MacLane, and O. G. F. Markhus, Mr. Mainland presided as chairman of the meeting, and Mr. Dickey acted as secretary pro tem."

Omitting part of it on the second page:

"The question of raising additional funds for the Idaho-Oregon Light & Power Company to take care of the extension of distributing systems and the building of transmission lines was taken up and discussed, and on motion of Mr. Watson, seconded by Mr. Mainland, it was

"Resolved, that a statement should be prepared and submitted by Mr. Markhus, as general manager of the Idaho-Oregon, showing the expenditures that had been made by that company in connection with the building of transmission lines, sub-stations, and distributing systems since July 1, 1910, and that the same should be forwarded to the Board of Directors for approval, for the purpose of being filed with the trustee under the mortgage, so that additional bonds may be secured for the raising of funds."

MR. CUMMINS offered and there were received in evidence Interveners' Exhibits Nos. 2 and 3, which are as follows:

Interveners' Exhibit No. 2.

MINUTES of a Special Meeting of the Board of Directors of IDAHO OREGON LIGHT & POWER COMPANY, held at the Chase National Bank, No. 83 Cedar Street, Borough of Manhattan, New York City, on September 25th, 1912, at 3:30 P. M.

Present: Messrs. Albert H. Wiggin,
Charles H. Sabin,
Samuel L. Fuller,
R. W. Watson,
William Mainland,
Sinclair Mainland,
Stacey C. Richmond,
A. E. Thompson.

Absent: Messrs. Grant Fitch,
Ralph Burtis,
John D. Ryan.

constituting a majority of said Board.

Mr. William Mainland acted as Chairman of the meeting and Mr. G. E. Hendee as Secretary thereof.

The Secretary stated that in due compliance with the By-Laws of this Company he had personally mailed a notice of the meeting to each Director at his address on September 20th, 1912.

The Secretary stated that the annual meeting of the Company had been held in Portland, Maine, on August 8th, 1912, and that the following had been

elected directors of the Company to serve until the annual meeting of the Company in the year 1913:

Messrs. Albert H. Wiggin,
Charles H. Sabin,
Samuel L. Fuller,
R. W. Watson,
William Mainland,
Sinclair Mainland,
Stacey C. Richmond,
A. E. Thompson.
Grant Fitch,
Ralph M. Burtis,
John D. Ryan.

The minutes of the meetings of the Executive Committee held August 15th and 30th were then read.

On motion, duly made and seconded, it was unanimously

RESOLVED that the acts of the Executive Committee as set forth in the minutes of the meetings held August 15th and 30th and read to the meeting be, and the same hereby are, in all respects, confirmed, ratified and approved.

The meeting thereupon proceeded to the election of officers to serve for the ensuing year.

William Mainland, Esq., was nominated for election as President of the Company to serve until the next annual meeting of the Company, and there were no other nominations for this office. A ballot was duly taken and Mr. Mainland was unanimously elected President of the Company for said term.

Stacey C. Richmond, Esq., was nominated for election as Vice-President of the Company to serve until the next annual meeting of the Company, and there were no other nominations for this office. A ballot was duly taken and Mr. Richmond was unanimously elected Vice-President of the Company for said term.

G. E. Hendee, Esq., was nominated for election as Secretary of the Company to serve until the next annual meeting of the Company, and there were no other nominations for this office. A ballot was duly taken and Mr. Hendee was unanimously elected Secretary of the Company for said term.

Mr. Hendee was nominated for election as Treasurer of the Company to serve until the next annual meeting of the Company, and there were no other nominations for this office. A ballot was duly taken and Mr. Hendee was unanimously elected Treasurer of the Company for said term.

John F. MacLane, Esq., was nominated for election as Assistant-Secretary of the Company to serve until the next annual meeting of the Company, and there were no other nominations for this office. A ballot was duly taken and Mr. MacLane was unanimously elected Assistant-Secretary of the Company for said term.

E. A. Wetmore, Esq., was nominated for election as Assistant-Treasurer of the Company to serve until the next annual meeting of the Company, and there were no other nominations for this office. A ballot was duly taken and Mr. Wetmore was unani-

mously elected Assistant-Treasurer of the Company for said term.

The meeting thereupon proceeded to the election of an Executive Committee to serve until the next annual meeting of the Company, and the following were nominated for such Committee: Messrs. William Mainland, Sinclair Mainland, Albert H. Wiggin, R. W. Watson and S. L. Fuller, and there were no other nominations for this Committee. A ballot was duly taken and Messrs. William and Sinclair Mainland, Wiggin, Watson and Fuller were duly elected to serve as the Executive Committee until the next annual meeting of the Company.

Mr. Watson made a statement as to the financial condition of the Company, and in conclusion recommended the raising of the sum of two hundred and fifty thousand dollars (\$250,000) to meet the requirements of the Company for the next seven months.

The Chairman presented and read to the meeting an agreement which Messrs. Kissel, Kinnicutt & Co., and Messrs. Wm. & S. Mainland proposed to make with this Company covering the loan to this Company of the sum of two hundred and fifty thousand dollars (\$250,000) as above mentioned:

AGREEMENT made this 25th day of September, 1912, between KISSEL, KINNICUTT & COMPANY, hereinafter called the "Bankers," parties of the first part, IDAHO-OREGON LIGHT AND POWER COMPANY, a Maine corporation, hereinafter called the "Oregon Company," party of the

second part, and W. AND S. MAINLAND, a firm transacting business in the City of Oshkosh, Wisconsin, and composed of Messrs. William and Sinclair Mainland, hereinafter called the "Mainlands," parties of the third part:

WHEREAS, under date of September 19, 1911, the parties hereto entered into a contract in writing whereby, among other things, the Bankers obligated themselves to purchase the Oregon Company one million five hundred thousand dollars (\$1,500,000) face value of the Oregon Company's Consolidated First and Refunding Mortgage Six Per Cent. (6%) Gold Bonds at eighty per cent. (80%) of the face value thereof, and

WHEREAS, pursuant to the terms of said contract the Bankers have purchased to the present date one million three hundred and twenty-five thousand dollars (\$1,325,000) face value of said bonds, leaving to be purchased the further amount of one hundred and seventy-five thousand dollars (\$175,000) face value thereof, which purchase at the said contract price would net the Oregon Company the sum of one hundred and forty thousand dollars (\$140,000) in cash and no more, and

WHEREAS, the Oregon Company will require during the next six months for its corporate purposes the sum of two hundred and fifty thousand dollars (\$250,000), and

WHEREAS, although the Bankers are ready and willing to purchase at the said contract price said one hundred and seventy-five thousand dollars

(\$175,000) face value of said bonds, but are unwilling to purchase any further amount of said bonds, and

WHEREAS, the Bankers have offered to procure for the Oregon Company upon the terms hereinafter expressed, the said sum of two hundred and fifty thousand dollars (\$250,000) in consideration of the Bankers being released from their obligation to purchase said one hundred and seventy-five thousand dollars (\$175,000) face value of said bonds, and

WHEREAS, said offer has been accepted by the Oregon Company,

NOW, THEREFORE, in consideration of the premises and the mutual covenants hereinafter expressed, it is agreed by the parties hereto as follows:

First: The Bankers agree to procure Idaho Railway, Light and Power Company, a Maine corporation, hereinafter called the Railway Company, to loan to the Oregon Company the sum of two hundred and fifty thousand dollars (\$250,000) or any part thereof, with interest thereon at the rate of six per cent. (6%) per annum, of which one hundred thousand Dollars (\$100,000) shall be loaned forthwith, and the balance thereof, whenever requested by the Oregon Company, (such request, however, to be made within six months of the date hereof and if not made within such period the obligation of the Railway Company to make the balance of the loan not so called for to cease and determine) each loan, when made, to be for a period of six (6) months

from the making thereof, with an option to the Oregon Company to renew said loan for the further period of six (6) months at the same rate, to be secured by an amount of the Oregon Company's said First and Refunding Mortgage Gold Bonds, bearing interest at the rate of 5% per annum, equal at their face value to twice the amount of such loan, and to be further secured by a promissory note in form as follows:

“New York, 19

Idaho Oregon Light & Power Company, a Maine corporation, promises to pay to Idaho Railway Light & Power Company, at its office in the City of New York, on dollars for value received, with interest thereon at the rate of six (6) per centum per annum, payable on having deposited with said Idaho Railway Light & Power Company as collateral security face value of Idaho Oregon Light & Power Company's First & Refunding Mortgage Five Per Cent. Gold Bonds, secured by the Mortgage and Deed of Trust made by said Company to State Bank of Chicago and dated April 1st, 1907;

With authority to sell such security at any broker's board, or at public or private sale, or otherwise, at the option of Idaho Oregon Light & Power Company, on the non-performance of promise, and, upon such sale, Idaho Railway Light & Power Company may purchase the whole or any part of such securities, discharged from any right of redemption, retaining claim against Idaho Oregon Light & Power

Company for any deficiency; any surplus arising from said sale, after paying in full the amount due on this loan, both principal and interest, together with the expenses of the sale in question, to be paid to Idaho Oregon Light & Power Company.

The principal of this note shall become due and payable

(a) Upon default being made in the due and punctual payment of any installment of interest thereon; or

(b) Upon default being made in the due and punctual payment of any installment of interest upon any of the Idaho Oregon Light & Power Company's bonds; or

(c) Upon any Court proceedings being instituted against Idaho Oregon Light & Power Company for the purpose of appointing a receiver or otherwise sequestrating its assets for the benefit of its creditors.

IDAHO OREGON LIGHT & POWER CO.,

By
President.

.....
Secretary."

(Corporate Seal)

Second: As further consideration moving from the Oregon Company to the Railway Company for the making of this loan, the Oregon Company shall on demand of the Railway Company deliver to the Railway Company, such amount not to exceed \$500,000 face value of its said First and Refunding Five

Per Cent. Gold Bonds as the Railway Company may from time to time demand, upon receiving in exchange from the Railway Company an equivalent amount of the Oregon Company's Consolidated First and Refunding Mortgage Six Per Cent. (6%) Gold Bonds, now owned by the Railway Company, provided, however, that there are or may be made available to the Oregon Company a sufficient amount of its said First and Refunding Five Per Cent. Gold Bonds to satisfy such demand, and that First and Refunding Bonds to the amount of said demand are available to the Oregon Company, and not appropriated for other purposes.

IN WITNESS WHEREOF, the party of the second part has caused these presents to be executed in its corporate name by its President thereunto duly authorized, and its corporate seal to be hereto annexed, and the parties of the first and third parts have hereunto set their respective hands and seals as of the day and year first above written.

IDAHO OREGON LIGHT & POWER CO.,

By Stacey C. Richmond,
Vice-Pres.

In the Presence of:
John T. Coit.

W. & S. MAINLAND,
By Wm. Mainland,
a member of the firm.

Forsyth Wickes

KISSEL, KINNICUTT & CO.,
By S. L. Fuller,
member of firm.

After a discussion of said agreement, on motion duly made and seconded, the following resolution was unanimously adopted, with the exception of Mr. Fuller's and Mr. Sinclair Mainland's votes which were not cast:

RESOLVED, that the agreement so presented and read to the meeting, be, and the same hereby is, in all respects, confirmed, ratified and approved, and that the proper officers of the Company be, and they hereby are authorized and requested to execute said agreement in the name of this Company and in its behalf, and to exchange the same when executed with Messrs. Kissel, Kinnicutt & Co., and Messrs. Wm. & S. Mainland.

The Chairman thereupon presented and read to the meeting a proposal from Idaho Railway Light & Power Company to advance to this Company the sum of two hundred and fifty thousand dollars (\$250,000), which proposal was as follows:

Dear Sirs:

Idaho Railway Light & Power Company proposes to lend to Idaho Oregon Light & Power Company, in such installments as the latter may request, (such request, however, to be made within six months of the date when this proposal is accepted and if not made within such period, the obligation of the Idaho Railway Light & Power Company to make the balance of the loan not so called for to cease and determine), the whole or any part of the sum of \$250,000 provided Idaho Oregon Light & Power Company will execute notes for such sums as are advanced

bearing interest at 6% per annum, due six months from the date of execution thereof, and will pledge, as security therefor its First and Refunding Mortgage 5% bonds to the extent of double the face value of said notes; the notes and pledge agreement thereunder to be in the following form:

“New York, 19

Idaho Oregon Light & Power Company, a Maine corporation, promises to pay to Idaho Railway Light & Power Company, at its office in the City of New York, on dollars for value received, with interest thereon at the rate of six (6) per centum per annum, payable on having deposited with said Idaho Railway Light & Power Company as collateral security face value of Idaho Oregon Light & Power Company's First & Refunding Mortgage Five Per Cent. Gold Bonds, secured by the Mortgage and Deed of Trust made by said Company to State Bank of Chicago and dated April 1st, 1907;

With authority to sell such security at any broker's board, or at public or private sale, or otherwise, at the option of Idaho Oregon Light & Power Company, on the non-performance of promise, and, upon such sale, Idaho Railway Light & Power Company may purchase the whole or any part of such securities, discharged from any right of redemption, retaining claim against Idaho Oregon Light & Power Company for any deficiency; any surplus arising from said sale, after paying in full the amount due on this loan, both principal and interest, together

with the expenses of the sale in question, to be paid to Idaho Oregon Light & Power Company.

The principal of this note shall become due and payable

(a) Upon default being made in the due and punctual payment of any installment of interest thereon; or

(b) Upon default being made in the due and punctual payment of any installment of interest upon any of the Idaho Oregon Light & Power Company's bonds; or

(c) Upon any Court proceedings being instituted against Idaho Oregon Light & Power Company for the purpose of appointing a receiver or otherwise sequestrating its assets for the benefit of its creditors.

IDAHO OREGON LIGHT & POWER COMPANY

By
President.

.....
Secretary."

(Corporate Seal)

And

Provided further that as a part of the same transaction and as a part of the consideration for such loan Idaho Oregon Light & Power Company will accept in exchange as the same may be offered for exchange by Idaho Railway Light & Power Company, dollar for dollar, and bond for bond, an amount not to exceed \$500,000 face value of Idaho Oregon Light

& Power Company's Consolidated First and Refunding Mortgage 6% gold bonds now held by Idaho Railway Light & Power Company for an equivalent amount of Idaho Oregon Light & Power Company First and Refunding 5% bonds, provided bonds to the amount of said demand are in the treasury or subject to be placed in the treasury of Idaho Oregon Light & Power Company.

Yours truly,

IDAHO RAILWAY LIGHT & POWER CO.,

By
President.

After a discussion of the proposal,

On motion, duly made and seconded, the following resolution was unanimously adopted:

RESOLVED that the offer of Idaho Railway Light & Power Company so presented to this meeting, be, and the same hereby is, accepted, and that the proper officers of this Company be, and they hereby are, authorized and directed to do all such things as may be requisite and necessary to close said loan.

The Chairman stated to the meeting that since July 1st, 1910, there had been expended by this Company for work done and materials furnished in connection with additions to and improvements upon this Company's properties, other than in connection with the Ox Bow development, the sum of \$506,387.57, for which expenditures the Treasury of this Company had not been reimbursed by the issue of

any of this Company's First and Refunding Gold Bonds.

The Chairman further stated that for such expenditures the Company was entitled to receive ninety per cent. thereof in this Company's First and Refunding Gold Bonds bearing interest at the rate of five per cent. per annum, to-wit, \$455,000 face value thereof.

After a discussion of the Chairman's statement,

On motion, duly made and seconded, the following preamble and resolutions were unanimously adopted:

WHEREAS this Company heretofore authorized an issue of bonds limited in the aggregate to the amount of \$7,000,000 known as its First and Refunding Gold Bonds, securing the same by a mortgage and deed of trust made to the State Bank of Chicago, as trustee, dated April 1st, 1907; and

WHEREAS of the bonds of said issue those bearing numbers from three thousand and fifty-one (3,051) to seven thousand (7,000) both inclusive, being each of the denomination of one thousand dollars (\$1,000) and aggregating in amount the sum of three million nine hundred and fifty thousand dollars (\$3,950,000) were reserved to provide means (first) for the purchase of other properties of a kindred character to those of this Company or stock in corporations owning and operating such properties; and (second) for additions, improvements, extensions, enlargements, equipments or betterments

to any of this Company's plants or property acquired at the time of the authorization of said bonds or thereafter to the extent of ninety per cent. of the amounts expended for such additions, improvements, extensions, enlargements, equipments or betterments; and

WHEREAS of the bonds of said issue so reserved \$2,799,000 face value have already been issued and certified, and \$1,151,000 face value thereof remain unissued and available for the purposes specified; and

WHEREAS this Company has expended \$506,-387.57 for additions to and improvements upon its properties since July 1st, 1910, said sum having been expended as follows:

	July 1, 1910 to Dec. 31, 1911	Jan. 1, 1912 to July 31, 1912	TOTAL
Power Plant Improvements (Excl. Ox Bow)	\$17,397.77	485.30	17,883.07
Transmission Lines	46,019.04	47,535.87	93,554.91
Substations	23,135.02	30,900.63	54,035.65
Distribution Lines, O. H.	91,051.39	46,893.38	137,944.77
Underground System		30,299.25	30,299.25
Transformers	28,313.39	11,990.07	40,303.46
Meters	26,327.65	7,034.01	33,361.66
Arc Lamps	3,439.52	2,278.76	5,718.28
Office Furniture & Fix.	3,514.08	2,132.50	5,646.58
Other Equipment	4,035.59	1,205.87	5,241.46
Engineering & Gen. Exp.	1,691.70	8,085.09	9,776.79
Ontario Water Works	3,641.18	1,437.38	5,078.56
Development	10,826.10		10,826.10
Salmon River Dev.	8,494.22		8,494.22
Weiser Development	48,222.81		48,222.81
Total	\$316,109.46	\$190,278.11	\$506,387.57

AND WHEREAS for the sums so expended this Company has not been reimbursed by the issue of any of its said First and Refunding Gold Bonds; and

WHEREAS of said bonds numbered from 3,051 to 7,000 both inclusive, those numbered from 3,342 to 7,000 inclusive have been executed by the proper officers of this Company and are in the possession of the said State Bank of Chicago;

NOW, THEREFORE, RESOLVED, that the proper officers of this Company be, and they hereby are, authorized and requested to forthwith execute and deliver for certification to the State Bank of Chicago, as Trustee under the mortgage and deed of trust securing said First and Refunding Gold Bonds \$455,000 Face Value of said First and Refunding Gold Bonds, said bonds to be of those reserved under Section 3 of Article II of said mortgage and deed of trust, to be of the denomination of \$1,000 each, to bear interest at the rate of 5% per annum, and to be numbered from 3,342 to 3,798 inclusive.

RESOLVED FURTHER, that the State Bank of Chicago as such Trustee, be, and it hereby is, authorized, empowered and requested to forthwith certify and deliver to the Treasurer of this Company, or upon his order, of the said First and Refunding Gold Bonds of this Company in its possession as aforesaid \$455,000 face value thereof; the face value of the bonds hereby authorized to be certified and delivered being equal to ninety per cent. of the sum actually expended by this Company from July 1st,

1910, to date, for the work done and materials furnished in connection with additions to and improvements upon its properties, other than that property known as the Ox Bow Bend on the Snake River in the State of Idaho, as indicated in the foregoing schedule.

RESOLVED FURTHER, that the Treasurer of this Company be, and he hereby is, authorized and directed to properly present this application with such accompanying papers as are required by the said mortgage and deed of trust dated April 1st, 1907, and upon receiving from the said State Bank of Chicago as such Trustee the bonds in question duly certified, to receipt therefor to said Trustee in the name of and in behalf of this Company.

On motion,

ADJOURNED.

(Signed) G. E. HENDEE,

Secretary.

Intervener's Exhibit No. 3.

MINUTES of a special meeting of the Executive Committee of IDAHO-OREGON LIGHT & POWER COMPANY, held at the office of Messrs. Kissel, Kinnicutt & Co., No. 14 Wall Street, Borough of Manhattan, New York, on September 27, 1912, at 9-30 A. M.

Present:

Messrs. William Mainland.

Sinclair Mainland.

R. W. Watson.

S. L. Fuller.

Absent: Mr. Albert H. Wiggin.

Mr. William Mainland acted as Chairman of the meeting and Mr. Sinclair Mainland as Secretary thereof. * * *

The Chairman presented and read to the meeting a proposed agreement to be made by this Company with Kissel, Kinnicutt & Co., W. & S. Mainland and Idaho Railway Light & Power Company, which Agreement was as follows:

AGREEMENT made this 27th day of September, 1912 between Kissel, Kinnicutt & Co. (hereinafter called the "Bankers") parties of the first part, Idaho-Oregon Light & Power Company a Maine corporation (hereinafter called the "Oregon Company") party of the second part, W. & S. Mainland, a firm transacting business in the City of Oshkosh, Wisconsin, and composed of Messrs. William and Sinclair Mainland (hereinafter called the "Mainlands") parties of the third part and Idaho Railway and Power Company, a Maine corporation (Hereinafter called "The Railway Company") party of the fourth part.

WHEREAS the first three parties above named did on the 19th day of September, 1911, enter into an agreement in writing relating to the purchase by the Bankers of \$1,500,000 face value of the First and Consolidated Six Per Cent. Mortgage Bonds of the Oregon Company, granting an option to the Bankers for the purchase of additional bonds of the Oregon Company, providing for the creation of a new company for the purpose of acquiring the Swan

Falls Power Plant on the Snake River in Idaho; providing for the exchange of the securities between the Companies and the control of said Companies and other like purposes, which agreement is hereby incorporated by reference and by said reference made a part of this agreement by way of recital, but not by way of covenant and condition and will be hereinafter referred to as the "Syndicate Contract."

AND WHEREAS the New Company contemplated by the Syndicate Contract has been organized and is the Railway Company mentioned in the premises hereof as the party of the fourth part hereto, and has acquired the said Swan Falls Power Plant, and certain electric lighting and distributing systems and plants in the cities of Caldwell and Nampa in the State of Idaho, and in other places and has also acquired certain electric railway lines and is engaged generally in the electric railway, lighting and power business in the State of Idaho and is supplying power to the Oregon Company above mentioned and has acquired by transfer from the Bankers certain stocks and bonds of the Oregon Company; and

WHEREAS the Bankers did on the second day of April, 1912 enter into an agreement with the Railway Company for the transfer to the said Railway Company of various of the properties mentioned in the preceding recital, which said properties have been transferred to the Railway Company, pursuant to said agreement by which the Bankers were given and granted an option to purchase the bonds of the

Railway Company under the terms and conditions therein mentioned, which said agreement is by the Bankers and the Railway Company expressly confirmed and continued in force, notwithstanding the execution of this agreement; and

WHEREAS conditions have arisen from time to time which have made it advisable in the opinion of the various parties hereto to alter the course of conduct prescribed and contemplated by the Snyder Contract and various things contemplated to be done by said agreement, have not been done, and other things have been done in place thereof believed to be to the best interests of all the parties to the said contract and consented to by them; and

WHEREAS the Bankers have purchased all the Consolidated Bonds of the Oregon Company required by said Syndicate Contract to be purchased by them with the exception of \$175,000.00 face value of said bonds and have for a valuable consideration been released from their obligation to purchase said \$175,000.00 face value of said bonds; and

WHEREAS the Bankers have been required from various causes in connection with the transaction contemplated by said Syndicate Contract and have from time to time, advanced far more money than was originally contemplated in said Syndicate Contract and have otherwise assisted beyond their contract obligations in carrying out the spirit of said Syndicate Contract; and

WHEREAS it is desired by the parties hereto to recognize the existing status of the party and to

mutually release and discharge certain of the obligations contained in the said Syndicate Contract and to confirm others;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

That the parties hereto do mutually absolve, release and discharge the various obligations of the Syndicate Contract sustained by each to the other, save and except as said obligations are hereinafter expressly or by reference continued in force; and do hereby confirm as satisfaction of said agreement except as hereinafter expressly stated, all acts of the parties hereto under said contract, or in substitution of the provisions thereof prior to this date.

The parties hereto do further mutually agree as follows:

First: That paragraph Fifth of the said Syndicate Contract wherein and whereby the Bankers are granted an option to purchase from the Oregon Company for cash at eighty per cent of their face value and accrued interest, the whole or any part of the Consolidated Bonds of said Oregon Company and prescribing the terms and conditions of said option and the whole of said Paragraph is hereby confirmed and continued in force and said option is by the Bankers transferred and assigned to the Railway Company and the Railway Company and the Oregon Company each recognize and confirm said assignment; PROVIDED that the provision of said Fifth Paragraph which grants said option on condition that the Bankers purchase \$1,500,000.00 face

value of said Consolidated Bonds is hereby modified to the extent that the Oregon Company accepts the purchase of \$1,325,000 face value of said bonds heretofore made by the Bankers as hereinbefore stated as full and complete satisfaction of their obligation to purchase said \$1,500,000 face value of said Consolidated Bonds;

Second: The Sixth Paragraph of said Syndicate Contract relating to the retirement of prior liens, bonds on the properties of the Oregon Company and providing for the issuance of Consolidated Bonds to retire said prior lien bonds, and the purchase of said Consolidated Bonds by the Bankers at eighty per cent of the face value thereof is hereby confirmed and continued in force; save and except that the Railway Company is hereby substituted to the rights and liabilities of the Bankers in respect to the covenants of said paragraph to the same extent as if the Railway Company were expressly named therein and the Bankers are released from all obligations thereunder and provided that the Oregon Company shall on demand of the Railway Company in lieu of tendering sufficient Consolidated Bonds at eighty, to retire said prior lien bonds, procure to be issued and delivered to the Railway Company at ninety, First and Refunding Mortgage Five Per Cent Bonds of the Oregon Company to the extent that said First and Refunding Mortgage Five Per Cent Bonds are available for such purposes and Consolidated Bonds at 80 for the balance for which said First and Refunding Mortgage Bonds are not available.

IN WITNESS WHEREOF the parties of the first and third parts have executed these presents in their firm names, by the duly authorized members of their respective firms and the parties of the second and fourth parts have caused these presents to be executed and their corporate seals affixed by their proper corporate officers, duly authorized in that behalf, all at the City of New York, on the day and year first above written.

In the presence of:

After a discussion of this agreement, on motion duly made and seconded the following resolution was unanimously adopted, with the exception of Mr. Fuller's vote, which was not cast:

"Resolved that the said agreement so presented and read to the meeting be, and the same hereby is in all respects confirmed, ratified and approved, and that the proper officers of this Company be, and they hereby are authorized and requested to execute said agreement in the name of this Company and in its behalf and to exchange the same with the other parties thereto." * * *

(Signed) SINCLAIR MAINLAND,

Secretary.

MR. CUMMINS read the deposition of *Mr. G. E. Hendee* taken in New York City on the 17th day of November, 1913, on behalf of respondents, under the stipulation that in reading such deposition the interveners should not be bound by it nor make the witness their own, which deposition was in substance as follows:

Witness stated that his business address was 14 Wall Street, New York, that he had been Secretary and Treasurer of Idaho-Oregon Light & Power Company since the fall of 1911 and still held such office. The directors of that Company, on September 25, 1912, were Albert H. Wiggin, Charles H. Sabin, Samuel L. Fuller, Stacy C. Richmond, John D. Ryan, Robert W. Watson, William Mainland, Sinclair Mainland, A. E. Thompson, Grant Fitch and R. M. Burtis. They remained directors until the 24th of February, 1913, when the five men first mentioned resigned, but the others continued to be directors of the Company. There was an Executive Committee of the Board of Directors composed of Messrs. Wiggin, Fuller, W. Mainland, S. Mainland, and Watson during the entire period between sometime prior to January 1, 1912, and February 24, 1913, when that committee resigned.

The witness then identified the record book of the Power Company and Minutes of a meeting of the Board of Directors thereof held December 1, 1911, in the City of New York showing the adoption of a resolution for the formation of the Executive Committee, and the election of the gentlemen above mentioned on that committee.

The witness then identified the minutes of the meeting of the Board of Directors of the Power Company held September 25, 1912, and previously shown herein as interveners Exhibit 2, and identified his signature at the end of the minutes, and said that

such minutes correctly stated what transpired at that meeting.

The witness then identified minutes of a special meeting of the Executive Committee of the Power Company at the Chase National Bank, 83 Cedar Street, New York, on Friday, December 27, 1912, and stated that they were the official minutes of the meeting. (These minutes are hereinafterwards shown as offered in evidence by respondents.)

The witness then identified minutes of a special meeting of the Executive Committee of the Power Company held at 14 Wall Street, New York, on September 27, 1912, being the minutes herein previously shown as interveners Exhibit No. 3.

Referring to the directors minutes of September 25, 1912, witness stated that the loans provided for at that meeting in connection with the exchange of consolidated for refunding bonds were made by the Railway Company to the Power Company as follows:

October 4, 1912, \$100,000.00; November 1, 1912, \$20,000.00; December 11, 1912, \$60,000.00; December 17, 1912, \$40,000.00; January 3, 1913, \$30,000.00, and continued: "440,000 first and refunding Idaho-Oregon five per cent bonds were put up as collateral against this loan, and such bonds were exchanged bond for bond for a like number of consolidated six per cent bonds previously held by the Railway Company, the Railway Company taking consolidated six per cent bonds as collateral for the loans when such exchanges were made."

In connection with the contract mentioned in the minutes of December 27, 1912, with respect to the settlement of the Bates & Rogers controversy, the Railway Company delivered to the Bates & Rogers Company one hundred shares of the common stock and fifty shares of the preferred stock of the Railway Company, and twenty-five thousand consolidated six per cent bonds of the Power Company, with the requisition that the Railway Company purchase such bonds under the conditions and at the figures specified in the contract (80 per cent of their par value). Under these two agreements of September and December referred to in the minutes of those dates the following exchanges of bonds were made: January 3, 1913, \$38,000.00; January 6, 1913, \$492,000.00; January 13, 1913, \$65,000.00; February 10, 1913, \$123,000.00. The serial numbers of the Power Company refunding bonds (being the so-called first mortgage bonds secured by the mortgage which has been foreclosed) obtained by the Railway Company in these exchanges were as follows: Numbers 2501 to 2514; 2525 to 2534; 3051 to 3192; 3198 to 3213; 3219 to 3279; 3285 to 3754. (All numbers given are inclusive.)

None of the loans made by the Railway Company to the Power Company have been repaid by the latter. The Railway Company surrendered to the Power Company an equivalent amount of second mortgage or consolidated bonds for the first and refunding bonds taken by it as provided in such agreement.

The total number of consolidated or second mortgage bonds issued by the Power Company was \$1,800,000, of which the Railway Company now owns \$854,000, and holds as collateral against loans \$750,000. Bates & Rogers Construction Company holds \$30,000, and the balance outstanding in the hands of the public is \$166,000.

On cross-examination by MR. CUMMINS the witness testified as follows:

His principal business was that of private secretary to Samuel L. Fuller of the firm of Kissel, Kinicutt & Company and he was also secretary of the Railway Company having occupied that position since the Company's organization in the latter part of the year 1911, when the Company was first organized under the name of Southern Idaho Light, Heat & Power Company, and later changed its corporate name, without other change of corporate organization, to Idaho Railway, Light & Power Company. He had been secretary of both the Power and Railway Companies since becoming Secretary of the latter.

On September 25, 1912, the Power Company and the Railway Company both had the same directors and the directors of the Railway Company held a meeting the same day as the directors of the Power Company. Witness had no recollection as to whether the same persons were present at both meetings, and did not remember why directors of the Power Company resigned on February 24, 1914, as mentioned

in his direct testimony, although he was present at the entire meeting. There was no reason given for the resignations nor discussion or inquiry as to the same. Individuals named did not resign as directors of the Railway Company, and the same persons continued to be directors of the Railway Company as on September 25, 1912.

Witness was actually present in person continuously at the meetings of the directors and Executive Committee of the Power Company throughout the discussions reported in the records identified by him, and the directors shown in the minutes were likewise personally present. The Power Company had no practice of calling up directors by telephone and procuring their assent to transactions. The records were loose leaf records, and sheets could be substituted without alteration or defacement. At the meetings at which he was present witness acted as Secretary and took the minutes with pencil and paper, taking *memoranda* of the resolutions in the form of brief notes as they were passed, and writing the minutes afterwards. Sometimes he wrote the minutes himself, sometimes his stenographer wrote them and after writing they were signed and put in the records by the witness himself. Witness had charge of the record books, kept them himself in a safe to which he held the only lock and key. The records, however, from time to time were in the hands of various persons.

In connection with the exchange of first mortgage bonds for second or consolidated bonds the witness

took the Power Company's bonds and sent them to the Guaranty Trust Company, with a requisition to exchange them for consolidated bonds, the Guaranty Trust Company being trustees under the Railway Company's mortgage, and the consolidated bonds having been previously put up with the Guaranty Trust Company under such mortgage. Previous to the exchange the witness personally had possession of the Power Company's first mortgage bonds, as Secretary of that Company, and was acting in his capacity of Secretary of both companies in making the exchange. He did not himself keep any records of the dates of such exchanges, but gave the dates from the records of the Guaranty Trust Company as examined by him. Previous to the exchange all the consolidated bonds, except 228,000, were owned by the Railway Company. He had no recollection as to how the Railway Company acquired such bonds. Originally \$440,000 of the first and refunding bonds were deposited with the Railway Company as collateral for loans for \$220,000.00. The witness personally turned over the second mortgage bonds as collateral to the Railway Company's loans when the exchange was made, his authority being as Secretary of the Power Company, under the exchange agreement, and was authorized by a meeting of the Executive Committee of the Power Company held on December 27, 1912.

The Railway Company had never sold any of its stock to the public, nor had there been any public trading therein. The witness could not give any

market value for the stock as it existed in December 1912.

The loans aggregating \$250,000.00, made by the Railway Company to the Power Company are all past due, nor has any interest been paid thereon. The accounts of the Company are all kept in Boise. The only account kept in New York is of money there on deposit. No duplicate of the Boise books are forwarded to New York. The Company's main office is in Boise, although the directors and Executive Committee always meets in New York where the Company has an office at 5 Nassau Street, next to Crocker & Wickes (New York counsel for both companies) of which office witness is in charge, being in and out every day. The Railway Company also has an office in the same room, and there are also in the office two employees of Kissel, Kinnicutt & Company as statisticians and investigators of things in which that firm is interested.

At the meeting of September 25, 1912, William Mainland was President of the Company and acted as Chairman. He put the resolution in the usual manner "all those in favor say 'aye' and those who are not say 'no'." He could not say that Mr. Mainland said 'aye,' and did not recall personally who voted 'aye' on the resolution, but there were no negative votes. He did not know how many persons or who actually voted in the affirmative, and did not remember who took part in the discussion of the resolution or who, if anybody, spoke in opposition to it, nor who seconded the motion. He did not know what

was done with the \$250,000.00 that was borrowed, did not remember any discussion as to what was intended to be done with it, nor what was proposed to be accomplished. He did not know anything about the market value of either the first or second mortgage bonds at that time. Witness did not recall why the exchange of bonds provided for in the contract of September 25, 1912, was not made until January and February 1913. He had no specific directions from anybody to make the exchange at the particular time and at the particular amount in which they were made, but acted entirely on his own initiative.

On RE-DIRECT EXAMINATION witness testified that the general scope of his duties as Secretary and Treasurer of the Railway and Power Company was to attend meetings of the Executive Committee and directors meetings, take the minutes of those meetings, attend to details authorized at those meetings, make loans to the Company as authorized, see that notes were properly executed, and collateral turned over as directed. He had nothing to do with keeping the auditing and accounting books, but journals, ledgers, cash and similar accounts were kept in Boise.

At the meeting of September 25, 1912, the Chairman put the motion, it was carried and there was an affirmative vote, and no protest or objection was made by any one. The President stated the motion was carried. The minutes were in the same condition as they were when signed by him, and no leaves

had been taken out or supplied, nor had any changes of any kind been made.

On Re-Cross Examination the witness stated that in his testimony as to the meeting of September 25, 1912, he was relying solely on his record and had no present independent recollection of what took place.

MR. CUMMINS then read the deposition of ROBERT W. WATSON, a witness produced on behalf of the respondents taken in New York City, on November 17th, 1913, under the same stipulation that in reading such deposition he was not making the witness his own and would not be bound by the testimony.

On Direct Examination by MR. MACLANE, the witness after giving his name stated he was Managing Director of the Power Company between September 1, 1912 and January 1, 1913, was also a director of the Company and member of the Executive Committee; was present at the meeting of September 25, 1912, when the resolution was passed relating to the exchange of Refunding for Consolidated Bonds, and was present at a meeting of the Executive Committee held December 27th, 1912, when the transactions were had with respect to the settlement of the Bates & Rogers controversy, and he had previously conducted negotiations with Bates & Rogers Company in the matter.

The reasons from the standpoint of the Power Company for cancelling the Bates & Rogers contract were given by the witness as follows:

"I was largely influenced in recommending the contract be cancelled by my belief that it was a bad contract for the Company and that if we could have it cancelled on any proper basis that it should be cancelled. That contract contemplated the construction of a dam across the Snake River and a power house that was to be used in connection with that dam, and our engineer, Mr. Blackwell, advised that the plans proposed under the contract should be materially changed; that instead of a rock-filled type of dam he advised the construction of a crib type dam, and the contract was so drawn that it seemed to me that it would not be satisfactory to go on with that contract for the completion of the Ox Bow development, and, therefore, I was very much in favor of having the contract abrogated—of coming to an agreement with the Bates & Rogers Company for the abrogation of that contract. I felt that the cost to the Company might be materially greater if we attempted to go on with that contract than if the contract were done away with and a new contract drawn up. I might say that there were other reasons that made me feel that it would be a wise thing to abrogate that contract. Q. Can you state in a general way, why you thought the cost would be greater under the old contract? A. That Bates & Rogers contract for the construction work was based—payments to them under the contract were to be made on two bases; one, a so-called unit cost of construction—that is, taking concrete work, say, of a certain kind, and then saying all concrete work of that character should

be paid for at a unit cost per cubic yard and other items of the contract would be paid for on a unit basis. Then in addition they were to receive payments for other parts of the work on a cost plus per cent basis. Certain work where it would be difficult to decide just what a fair cost would be—for instance the putting in of coffer dams in the river, and work of that class—where the work was under way, was to be paid for on the cost plus per cent. basis. Well, by the old plan of construction I felt, and our engineer so stated, that the contract was so drawn, that it was not satisfactory to the company, that the Company would not be sufficiently protected in going on with the new type of dam that was suggested under the old contract, and that, if, for instance, Messrs. Bates & Rogers were of a mind to do so they could make the Company pay more than they should for the work. In other words, that if there were no contract with the Bates & Rogers Company and if a contract were to be entered into between some contractor and the Idaho-Oregon Company then the Idaho-Oregon would not enter into a contract at all like that but could and would enter into a contract very much more favorable to the Idaho-Oregon Company, and Mr. Blackwell thought that the amount involved might be very considerable,—that was the main reason that influenced me. Q. Did the questions of the change of the type of construction from the concrete dam covered by the original contract to the proposed rock-filled crib dam effect your judgment as to the cancellation of this contract? A. Yes, it

was largely in view of the change that I did feel that way."

The negotiations with the Bates & Rogers Company looking toward the cancellation of the contract were begun some time after the witness took hold the management of the Company (in the fall of 1911) and were continued intermittently until they were finally settled. The negotiations were not completed by him, but were turned over by him to Mr. Wickes, the Company's attorney, and by the Bates & Rogers Company to a lawyer in New York. On July 24, 1912, at a meeting of the Executive Committee the matter came up in the form of an offer by Bates & Rogers to the Committee, which was rejected by it, as appears by the following minutes, which it was stipulated should be read into the record.

"MINUTES of a meeting of the Executive Committee of Idaho-Oregon Light & Power Company, held at the Chase National Bank, New York City, on Wednesday, July 24th, 1912, at 4. P. M.

Present:

Messrs. William Mainland.

Albert H. Wiggin

S. L. Fuller

R. W. Watson

Sinclair Mainland

Mr. Wiggins acted as chairman of the meeting and Mr. Sinclair Mainland as Secretary thereof.

Mr. William Mainland reported that in company with Mr. Blackwell, the consulting engineer of this

Company, he had conferred with Mr. Rogers of Bates & Rogers in Chicago on July 1st and 2nd on the question of the cancellation of the contract existing between this Company and Bates & Rogers Construction Company covering the construction of the Ox Bow Development. Mr. Mainland stated that as a result of this conference he was in receipt of an offer from Mr. Rogers which was as follows:

OFFER OF BATES & ROGERS

(1) Idaho Company to pay Bates & Rogers as follows:

(a) *Inventory value*

5,380 yards gravel at 1.44	\$ 7,755.61
Lumber and poles,	6,543.27
Buildings	2,523.50
Camp Equipment (B & R)	961.54
Misc. Material "	525.37
Misc " (Joint B & R prop.) ..	395.36
Commis. Supplies	5,030.93
Black Powder	2,092.60

(b) *Labor, Interest, Depreciation, etc.*

Misc. Unpaid bills	2,170.82
Retained percentage	13,000.00
Handling Reinfor. Steel	812.13
Handling and storing cement	1,447.28
Unit Price plant, Instal, etc.	2,750.88
Forms built and not used	4,122.63
Interest 6% \$9,154.82 less \$1,470. ..	7,684.82
5% Struc. Steel erected	1,000.00
Depreciation of plant	1,500.00

34,488.56

(c) *Lost Profits*

Cash 10,000.00

(d) *Lost Profits*

White Plant to B & R estimated at
\$15,000.00 15,000.00

RECAPITULATION

(a) Inventory Value	25,828.18
(b) Labor, Interest, Depreciation, etc ..	34,488.56
(c) Lost Profits	10,000.00
	<hr/>
	70,316.74
(d) White Plant, (est. at)	15,000.00
	<hr/>
	\$85,316.74

After a discussion of the offer, on motion duly made and seconded, it was unanimously

RESOLVED that said offer be and the same hereby is rejected.

RESOLVED further, that Mr. Watson be and he hereby is authorized and requested to present to Bates & Rogers Construction Company in behalf of this Company a counter-proposition to the following effect:

PROPOSED OFFER TO BATES & ROGERS

- (a) Inventory Value (as checked)
- (b) Labor, Interest, Depreciation, etc. (as checked)
- (c) Cut out
- (d) Cut out
- (e) Buy B & R Plant (at fair value) (B & R Valuation \$26,158.24) (Cancel Contract.)

Mr. Watson thereupon proposed that should he succeed in securing the cancellation of said contract upon the terms authorized, that the following work in connection with the Ox Bow development be done, namely, that the head-gates be put in and that certain further construction be carried out to enable water to be turned through the existing tunnels. The cost of this work Mr. Watson stated had been estimated by Mr. Blackwell at \$40,000., of which \$25,000., was for the head gates, and \$15,000., for the construction necessary to enable the water to be turned through the existing tunnel.

After a consideration of Mr. Watson's proposal, on motion duly made and seconded, it was unanimously

RESOLVED, that should Mr. Watson succeed in securing the cancellation of said contract upon the terms authorized this Company itself install head-gates at the Ox Bow development according to the plans and specifications of Messrs. Viele, Blackwell & Buck, and under their direction, and effect such further construction as will enable water to be turned through the existing tunnel, and that for this purpose the sum of \$40,000., be appropriated."

On Cross Examination by MR. CUMMINS, the witness testified that to his best recollection Mr. Wickes settled the dispute for \$20,000 of bonds, although he was not certain and had nothing to do with the final settlement except as the terms were presented to an Executive Committee meeting, and Mr.

Wickes had told him personally what he had been able to do, and he was in favor of the settlement. He recalled distinctly that Bates & Rogers had large claims against the Company, which were settled. That the principal part of the settlement was work done, commissions held back and values considered, which, whether the contract was released or not the Company would have had to pay Bates & Rogers.

The necessity or desirability of obtaining a release from the Bates & Rogers contract arose partially by change of plan as recommended by Mr. Blackwell (the Company's consulting engineer), but he would have been in favor of cancelling the contract regardless of the change of plan, unless the cost of doing so was too great. His recollection was that the bonds given to Bates & Rogers were given as a bonus or forfeit money for cancellation of the contract. As far as known to witness first mortgage bonds were not offered to Bates & Rogers for the settlement.

With respect to the meeting of September 25th, 1912, witness stated that he was Managing Director of the Company at the time, but thought the plan of dealing with the Company's affairs originated with the Executive Committee, and continued as follows:

"The necessity of funds at that time was constantly being presented to the attention of the Executive Committee, and I don't remember whether the actual plan that was adopted by the directors was ever formally acted upon in the Executive Commit-

tee. I should say that certainly all the members of the Executive Committee knew that such a plan was to be presented to the Board of Directors. The records, of course, of the Executive Committee might or might not be full in regard to that matter. Q. There were still \$140,000 due to the Company from Kissel, Kinnicutt & Co., under their contract to purchase a million and a half of consolidated bonds on September 25th, 1912, and the company as recited by the resolution needed to raise \$250,000? A. Yes, as I remember. Q. What were the plans with reference to the Company's affairs—What was it proposed to accomplish with this \$250,000—what particularly was it proposed to accomplish with \$250,000, that couldn't be accomplished with \$140,000? A. As I remember it, we were being pressed for moneys for the corporate purposes of the Company and the necessity that we had to provide money for making extensions and buying electrical apparatus and so forth to handle our business. As I remember it, nothing particular stands out, although there may have been something. Q. Do you remember what claims were particularly pressing? A. No, sir, I don't. Q. Did you as Managing Director in planning for and agreeing to this loan of \$250,000, have plans under which this \$250,000 would take care of the Company, not merely for an hour or a day, but provide for its affairs in the future, so that it was a reasonable and proper thing to do in your judgment? A. Answering the last part of the question first, I certainly thought that it

was a proper transaction. Answering the first part of the question I am certain, generally speaking, that we had a financial programme that required that sum of money. I don't remember in detail. Q. Do you know to what time in the future that programme extended and provided for the Company's necessities? A. I don't remember the time. We were constantly in need of money. Q. Did that programme provide, for instance for the payment of interest on the First Mortgage Bonds to fall due on October 1st? A. I don't remember. I should say that it did—I am not certain. Q. Did it provide for the payment of interest on the Second Mortgage as it fell due on November 1st? A. I should say, generally speaking, yes. I don't remember specifically just what it covered. Q. Do you remember how long thereafter before the Company was again out of funds and being pressed for money? A. I don't remember. Q. In short did the \$250,000 really provide for any programme that was of any real importance to the Company—that it was not merely a temporary make-shift in the affairs of the Company? A. I wouldn't say that it was a temporary make shift. Q. Will you state Mr. Watson, and you, I take it, should know in your position as Managing Director—you must have been planning in general ways for the protection of the property not only for the immediate future but for a more distant future—what were the prime necessities of the Company in order to keep it solidly and safely on its feet as a going concern? A. There would be, of course, the interest charges to be

met; then there would be the sums of money that were required to take care of the extensions of customers. Q. How much did they amount to on an average per annum? A. I couldn't answer that. Q. They were going on constantly, were they not. A. Yes, they were going on constantly and requiring substantial sums of money as the business grew. Q. Did such sums of money required for extensions and constructions amount to \$250,000, a year, we would say? A. In the past, I should say no. Q. But for the future, as you then viewed it on September 25th, 1912? A. There was a great deal of uncertainty at that time as to what our future was to be—you know what I am referring to. Q. Uncertainty in what respects. A. Uncertainty in connection with competition was staring us in the face. Q. Did you feel that there was uncertainty about the Company being unable to keep on going? A. In view of the competition. Q. In view of everything? A. In view of everything, yes. Q. The Company was greatly in need of additional power, was it not? A. It was in need of additional power considered by itself, but not including the Idaho Railway Company. Q. Including that Company there was power enough? A. We felt that there was power enough. Q. Did your plans on September 25th, 1912, include going on with the Ox Bow development? A. There was nothing definite decided at any time about the Ox Bow—simply we didn't have the money to go on with it; but we all felt that it was going to be continued at some time in the near future. Q. These

plans that were made on September 25th, didn't have any particular or definite relation to the Ox Bow? A. I think they did, because I think included in our programme were certain sums to be expended on the Ox Bow development—the installation of the head-gates, as I remember, I may be mistaken in my dates though. Q. Do you know Mr. Watson when the conclusion was first reached that the Company could not go on and continue to pay its interest and keep on its feet as a going concern? A. Well, I remember it was agreed shortly before I left the management of the Company. Q. At that meeting of September 25th, 1912, was there any discussion among the members of the Board about this plan of releasing Kissel, Kinnicutt & Co., and borrowing \$250,000, and making this exchange of bonds. Was there a debate or discussion about it. A. My memory is that it was discussed at some length. Q. Did anybody in that meeting point out the fact that the effect of the contract was to strip the Company of all of its really available assets with which to raise money? A. I don't remember anything, but in a general discussion I think everyone appreciated the seriousness of the matter—I know I did, and presume others did. Q. Had you, as Managing Director, made any effort to see wheether you could raise money on the First Mortgage Bonds which the Company had? A. No, sir, I made no such effort. Q. How many First Mortgage Bonds did the Company have at this time available? A. I don't remember the figures. Q. And you don't remember what par-

ticular pressing necessities of the Company were to be met with the money to be obtained on this loan?

A. No I do not. Q. Do you know, Mr. Watson, in a general way—speaking of large items and not details—what actually was done with this \$250,000?

A. As I recall, without and definite memory of the exact transactions, the money was paid into the treasury of the Company and was used for corporate purposes. Q. Of course, that doesn't answer the question. For example, was it used to pay existing obligations already incurred and which were pressing?

A. I should say yes, without knowing. I don't know a thing about those things. Q. This agreement was made on September 25th. Do you recall that a large part of that money was not obtained by the Company until sometime in December—three months after that?

A. I remember nothing specifically about the dates of the payment. That sounds to me right, but I don't remember specifically. Q. Had there been any transactions in the First Mortgage Bonds of the Power Company during the summer and early fall of 1912 prior to September 25th, 1912, in the buying and selling of those bonds?

A. No, sir, I don't know. Q. You don't know whether they had a market value?

A. No, I don't know of any transactions. Q. Were there any transactions that you know of except sales to Kissel, Kinicutt & Company in the Seconds. A. No transactions to outsiders. Q. Do you know whether or not any of the executive officers of the Power Company made any effort prior to September 25th, 1912, to

raise money for the Company's requirements by other means than the making of this contract with Kissel, Kinnicutt & Company and the Railway Company? A. I am not sure, but I believe William Mainland did make such an effort. Q. You didn't make any effort yourself? A. No, sir, I didn't consider that was my business. Q. Who was the person most directly charged with the responsibility for the financial affairs of the Company on and just prior to September 25th, 1912? A. I think that I am making a fair statement when I say the Executive Committee. Q. But the Executive Committee consisted of five men and they could only act officially in meeting. The Company did have executive officers, did it not? A. Yes, William Mainland was President. Q. And was he acting as the chief executive officers of the Company? A. Yes, in certain matters. Q. You had charge of the operation. A. I had charge of the operation—that was my business, not of the finances. Q. Were the other executive functions of the Company left in the hands of the President other than the operation? A. Well, it was the President, Mr. Fuller, Mr. Wiggin, Sinclair Mainland and myself. I was always a party. I think I am safe in saying that nothing was done while I was Managing Director that I was not a party to—there was nothing that transpired in connection with either Idaho-Oregon Light & Power Company, or Idaho Railway, Light & Power Company, that I believe I didn't have some knowledge of. Q. Then if William Mainland had negotiations

with reference to financing the Company in the period prior to September 25th, you would have known it? A. Now, you are not getting that idea from anything I said? You asked me if I remembered if any effort was made prior to that date in any other way. Now I say that I don't know definitely, but I have some idea that Mr. William Mainland either did make such efforts or was talking of making some such efforts. The matter was discussed certainly what the Idaho-Oregon should do to get money. It had to have money and the question was how to get it. Q. Do you know of any specific thing which Mr. Mainland did in an effort to finance the Company prior to September 25th, 1912? A. You mean after the formation of the Company? Q. Yes. A. Nothing specific, no. Q. No effort was made so far as you know by any one representing the Company to obtain money upon a direct pledge of the First Mortgage bonds which the Company owned or to which it was entitled as trustee? A. I don't know of any such effort.

RE-DIRECT EXAMINATION BY JUDGE MAC-LANE:

Q. Mr. Watson, I hand you what purports to be a letter under date of June 15th, 1912, to yourself from Mr. F. O. Blackwell. Examine it and state if it is such letter. A. This is a letter which I received from Mr Blackwell. Q. Is that one of the Blackwell recommendations upon which you acted in reference to securing a cancellation of the Bates & Rogers contract. A. Yes. The letter is as follows:

“June 15, 1912.

Mr. R. W. Watson,
14 Wall Street, New York City.

Dear Mr. Watson:

Mr. Rogers of Bates & Rogers Construction Company has been here for the last two or three days discussing the Ox Bow contract. He was very anxious to do the work on the basis of the unit prices in the contract, which were evidently not intended for the kind of work which you are now proposing to do. If done on this basis I should say that the work would cost \$100,000 more than it would if the Company did it directly. I propose that he do the work on a 10% basis, but he would not agree to this, and I could not get anything definite from him regarding his claims for damages, etc., on work already done. Finally at his request I wrote him a letter, a copy of which I attach. He said he would make a proposition as soon as he had a chance to go over his books in Chicago. What he naturally wishes is to avoid any discussions which might cause friction until he has done all the work possible and has everything to gain and nothing to lose by claims for additional compensation. It has been very difficult to reach any conclusion with Mr. Rogers, as he states that he has been told to prosecute the work vigorously. I have told him my understanding was that no work was to be done at the Ox Bow unless it could be done at a cost which would compare favorably with the development of the same amount of power at Swan Falls.

Yours very truly,

F. O. Blackwell.”

Q. That Mr. F. O. Blackwell who signs that letter is the engineer whom you referred to in the previous part of your examination. A. Yes.

MR. CUMMINS then read the deposition of S. L. FULLER taken on behalf of interveners in New York on November 18, 1913, upon which Mr. Fuller testified substantially as follows:

The witness recalled the meeting of September 25, 1912, and continued:

Q. The Company, according to the record, made this agreement because it was in great need of funds at the time. Can you state in a general way what the special needs—the pressing needs of the Company were at that time for funds that was the occasion of that arrangement? A. I don't remember the details."

Witness gave more attention to the affairs of the Power & Railway Companies than the other members of his firm who were the syndicate managers, though other members went out to Idaho and knew the situation. He did not know with whom the plan to borrow \$250,000.00 of the Railway Company originated, but thought it came from Mr. Wickes, who was the Attorney for both companies. He gave the matter of borrowing the money from the Railway Company some consideration before the meeting of the Board. In answer to a question calling for the purpose to be accomplished by obtaining the money he said "The Company was in urgent need of money and it used this method to obtain that

money." He did not remember whether there were any purposes contemplated by the Board except the meeting of immediate pressing necessities, and could not say what was, in fact done with the money, nor whether the first mortgage bonds of the Power Company concerned in the exchange had any market value at the time and remembered no recent transaction with respect to such bonds or the second mortgage bonds, saying that there may have been or may not have been such a transaction.

Referring to the contract of September 19, 1911, by which Kissel, Kinnicutt & Company became interested in the affairs of the Power Company witness stated that a great many considerations entered into the making of that contract, that the market for the consolidated mortgage bonds at that time was about 80, and that was their market value so far as the market existed, and he could give no opinion as to what the value of those bonds was at the time, but some had been sold to the public at that price or better prior to that time. His firm received the stock called for in the contract of September 19, 1911. An extensive report on the properties had been made by the Coverdale Company, which he had read.

On Cross-examination by MR. MACLANE the witness testified:

That in the latter part of August or first of September, 1912, Mr. Markhus (the Company's Manager) Mr. Mainland, Mr. Watson, and himself discussed at length the financial requirements of the Company, and were given statements of such finan-

cial requirements. That he thinks that there was some discussion then as to the use of refunding bonds in connection with the raising of additional funds for the Company.

On Re-direct Examination by MR. CUMMINS witness stated:

That he had no recollection of any effort being made by the Company to raise money directly by sale or pledge of its first mortgage bonds. The Executive Committee controlled and directed the financial affairs of the Company, but he did not remember of members of that Committee or any officer of the Company making any effort to sell or pledge the first mortgage bonds to raise money prior to September 25, 1912. He had no recollection as to whether they did it or did not do it.

MR. CUMMINS then read the deposition of *Stacy C. Richmond*, called as witness on behalf of the interveners, taken in New York on November 18, 1913. Mr. Richmond testified in substance as follows:

Witness was in the banking business and connected with the firm of Winslow, Lanier & Company, which was interested in the Idaho-Oregon syndicate. He was a member of the Board of Directors of the Power Company on September 25, 1912, and also of the Railway Company, which position he still held. He was present at the meeting of the Directors of the Power Company on September 25th, 1912, and recalled the transaction in question, which he understood to be an exchange of refunding mortgage

bonds for consolidated mortgage bonds, the consolidated bonds being junior to the refunding bonds, and, in that sense, second mortgage bonds. He did not recall what the urgent needs of the Company were at the time, but his general memory was that the General Manager of the Company, Mr. Watson, made a statement at the meeting of the needs of the Company. He remembered the Company was sadly in need of money for the purpose of meeting then existing obligations and bills which would accrue, but he did not recall the time within which said bills would accrue. There was no statement, so far as he could remember, by the Managing Director or other person that with this money the Company's affairs would be put in secure position so that they could go on with their business thereafter with certainty.

With respect to the meeting in December, 1912, when the settlement of the Bates & Rogers controversy was had he knew that there was an awkward situation between the Company and Bates & Rogers, and knew in a general way that there were plans for its settlement but he personally had nothing to do with them.

On Cross-examination by MR. MACLANE the witness stated that the exchange of bonds were put to a vote at the December meeting, and that there were no dissenting votes.

On Re-direct Examination he said that he did not remember that Mr. Sinclair Mainland objected to the resolution but that Mr. Fuller asked to be record-

ed as not voting, and Mr. Mainland may have asked to be recorded as not voting, for a similar reason as that of Mr. Fuller, but he did not remember fully, nor as to whether Mr. A. E. Thompson made any statement with reference to the purpose and character of the resolution.

MR. CUMMINS read the deposition of ALBERT H. WIGGIN, called as a witness for the interveners, taken in the City of New York on November 19, 1913.

Witness stated that he was President of the Chase National Bank, which bank was interested in the syndicate in control of the Railway Company. He was a Director of the Railway Company and on September 25, 1912, was a Director of the Power Company. He remembered the meeting of the Board which took place on that day, and prior to that time had been on the Board and Executive Committee, in which capacity he had attended meetings and listened to the statements of officers as to the financial needs of the Power Company. What those needs were was vague in his mind at the time the deposition was taken, but they were represented as very urgent. He was relying on statements made by the Managing Director. Prior to the time he had not, he thought, conferred with other members of the Executive Committee or Board as to exchange of bonds.

With respect to the adoption of the resolution in question he said "It was presented and perhaps discussed is a little strong word, but it was presented and Mr. Fuller stated that, representing Kissel, Kin-

nicutt & Company in this matter he didn't wish to vote on the transaction and asked to be recorded not voting; one of the Mainlands (Sinclair) said "me too" and I personally put it up to Mr. Thompson, who was there. I felt that Mr. Thompson was from out there, and he was not interested in this thing as we were, and we relied on his judgment; he voted for it and we all voted for it, except the two not voting." "I haven't a distinct recollection of his voting for it, but I have a distinct recollection of his approving it so that I voted for it." "Mr. Watson advocated the transaction, and no one spoke in opposition to it, but there were some questions asked. I asked some, and the Mainlands asked some." "My recollection is it was unanimous, there were two men who didn't vote, but otherwise it was unanimous."

"My understanding as to the need of money was it was simply to keep the Company going." "It was represented to us that we just had to have money, that they needed it and it was urgent." "I understand that part of it was for debts already incurred." "We understood they needed the money, and that if they didn't get the money they would fail." "Q. Fail at once? A. Yes but I don't know for how long a time, nor they didn't say how much would put them on a financial footing. It seemed to be the wise thing to do at the moment to give them money and keep them from failing."

With respect to whether any effort had been made prior to September 25, 1912, to obtain money di-

rectly from the sale or pledge of the bonds witness said that efforts had been made, although he did not know how definite they were. He had no personal knowledge of such efforts, and he did not think they had applied to the Chase National Bank for funds.

With respect to the Bates & Rogers transaction on December 27th he said that he did not remember having familiarized himself with the situation prior to making the arrangement in question. The Railway Company thereby obligated itself to guarantee \$20,000.00. He did not recall whether first mortgage bonds were offered directly to Bates & Rogers instead of seconds or not, nor whether any effort was made to find out whether they would take firsts without a guarantee from the Railway Company, nor whether any effort was made to obtain the money by sale or pledge of the first mortgage bonds. Further, that he did not know who proposed the arrangement except that it came from the officers and active directors. He thought probably that it was recommended by Mr. Watson or that he must have at least joined in the recommendation. He did not recall whether anybody spoke in the meeting in advocacy or in opposition to the plan, but it was explained as a thing to be done to save the situation. He did not know that it was advocated except as a statement of a condition which existed, and it seemed to be the only thing to do. His personal action was based on the recommendation of those in active control, and he did not make any independent investigation as to the necessity for such action.

On Cross-examination by MR. MACLANE the witness stated that nobody, no banker, not already interested in the Idaho-Oregon situation would have made any advances or loans to the Company on its refunding bonds in September, 1912, nor would the Chase National Bank have made such a loan in view of its knowledge of the Company's condition at the time had they been asked to do so. The minutes of the meeting accorded with the recollection of the action taken by the Board at that meeting.

MR. CUMMINS then read the deposition of *Charles H. Sabin*, called as a witness by interveners, taken in New York City, on November 19, 1913.

The witness stated that he was Vice President of the Guaranty Trust Company, which had an interest in the syndicate to purchase bonds of the Railway Company, and was also trustee under the mortgage of the Railway Company. That Company was also either registrar or transfer agent of the Power Company. He further had a personal interest in the syndicate, and was at the time of his deposition and on September 25, 1912, a Director of the Railway Company, and was a Director of the Power Company also on that date although he was not still such director. He remembered the meeting at which the bond exchange was voted on, and that the transaction was made, but had not prior to that time made any independent investigation, and has no independent knowledge of the financial situation of the Power Company. He did not remember what was said in

recommendation of the plan, who proposed it, nor recommended it, nor that anybody was opposed to it. He voted for it because he assumed that plan had been looked into and approved by the men practically running the companies. That is, the main actors in the affairs of which he was not one. He did not know what was proposed or expected to be accomplished by the Company in obtaining the money.

He had no knowledge or recollection at all of the transaction of December 27, 1912, respecting the settlement of the Bates & Rogers controversy, nor had it ever been called to his attention as a director, and he has no opinion as to its propriety.

He did not know of any efforts made by the officers of the Company prior to September 25, 1912, to obtain the money which it needed by other means than the transaction then entered into, nor of any efforts being made by the officers or persons active in the Company to provide the money needed for the Bates & Rodgers transaction by other means than were there adopted.

He resigned as Director of the Power Company on February 24, 1913, because he was asked to, but did not remember by whom.

MR. CUMMINS read the deposition of A. E. THOMPSON taken on behalf of the interveners on June 3, 1914, at Oshkosh, Wisconsin.

Witness gave his residence as Oshkosh, Wisconsin, and his occupation that of a lawyer; he was elected director of the Power Company in August,

1912, and had been director for several years prior to that time, but had tendered his resignation to the President before the annual meeting of 1913; he was a director of both the Power Company and Railway Company on September 25th, 1912, and attended the meeting of the directors of both companies held at the Chase National Bank in New York City on that date. With respect to this meeting witness testified as follows:

“The matters which came before that meeting relate, as I understand it, as I understand it not to \$718,000 in bonds but \$500,000 in bonds. I never knew or heard of any proposed trade or exchange of other bonds until within the last ten days. The meeting was called for 3:30 o'clock in the afternoon of that day, of the Idaho-Oregon Light & Power Company. The meeting as a matter of fact was not called to order until about four o'clock, or a little later; when the meeting was called to order by Mr. William Mainland, the chairman, Mr. Hendee, the secretary of both companies, was present. Mr. Hendee did not occupy a seat at the table. Mr. William Mainland, as president, sat at the end of the table which was nearest the door by which we entered this room; at his left and around the corner of the table sat Mr. Wiggin; at Mr. William Mainland's right and around the corner of the table sat Mr. Sinclair Mainland. I sat next to Mr. Sinclair Mainland, that would be to his right. Mr. Hendee sat in a chair back of Mr. Sinclair Mainland and a little to his left, so that Mr. Hendee was probably two feet from

Mr. Sinclair Mainland and four or five feet from me. Mr. Wickes who was recognized as the attorney or counsel for both companies was present and sat on the opposite side of the table from me, and a little further to the right than I sat. A line drawn from Mr. Wickes to me as compared to the table would have been an angle of about 45 degrees. When Mr. Mainland said that the meeting would be in order, Mr. Wickes picked up from papers that lay in front of him, some sheets of typewritten paper fastened together, according to my best recollection in a blue cover, and he began to read therefrom. It was only a moment or so after he began to read, that I discovered that he was reading the proposed minutes of the meeting. Mr. Hendee did not keep any minutes at all. Mr. Wickes read along, and if there was no objection made he continued the reading, and as I understood it, that was supposed to be the action of the board. If he came to any subject where any question was asked, if it amounted to more than a simple question of information, there was any discussion, as I remember it, the question was put by the chairman and voted upon. These proposed minutes that Mr. Wickes had and was reading from were evidently prepared prior to the assembling of the board of directors. When Mr. Wickes reached the question of the contract that was before the board there on the question of relieving the Bankers from the purchase of \$175,000 of Consolidated 6's, which would go to make up the total sum of \$1,500,000; he read along and in the

proposed minutes which he had in his hand the contract was not inserted, nor was the form of the note inserted in these minutes. I saw those minutes during or immediately at the close of the meeting. When those proposed minutes came along to the question of the contract, they said something like this, "Here enter contract," or "Here put in contract," and when they came along to the point of the note, they said "Here put in note," or "Note," something of that kind; in other words, the contract that was then proposed, and the note, were not made a part of the proposed minutes. He read along until he came to a statement in the minutes where it said something like this—well I have got them here and can give it—but from memory it said that the resolution was unanimously adopted except the vote of Mr. S. L. Fuller, which was not cast. I am speaking of that part of the proposed minutes which Mr. Wickes had there and was reading, from which he stated that the chairman presented and read to the meeting an agreement which Messrs. Kissel, Kinnicutt & Company and Messrs. William and Sinclair Mainland, proposed to make with the Company, covering the loan to this company of the sum of \$250,000, as above mentioned, and that "above mentioned" refers to what preceded it, this: "Mr. Watson made a statement as to the financial condition of the company and in conclusion recommended the raising of the sum of \$250,000 to meet the requirements of the Company for the next seven months." To make what I said before more accurate, the proposed minutes

I believe, that is my best recollection, and my belief to some extent is based upon a copy of the amended minutes as furnished me by Mr. Wickes—as Mr. Wickes read this, “After a discussion of said agreement, on motion duly made and seconded the following resolution was unanimously adopted, with the exception of Mr. Fuller’s vote, which was not cast.” Now, when he read that Mr. Wickes said, Mr. Fuller, a member of the firm of Kissel, Kinnicutt & Company as an interested party, does not wish to vote. Mr. Fuller said, “That is so, I as an interested party do not wish to vote,” or words to that effect. Mr. Sinclair Mainland then made an expression which I cannot put in words, but he may have said “Me too.” Mr. Sinclair Mainland then turned to me and he says: “How shall we vote?” I said “I am going to vote No, it is about time that we began to exercise some independent action.” Then Mr. Sinclair Mainland says “I vote No.” I do not know how the question of when I should vote come up, my best recollection is though I may not be correct, that Mr. Mainland looked around the table and called the names, but I ain’t sure about that, but anyway when it came for me to vote I said “I vote No,” and I turned directly to Mr. Hendee, who sat as I have expained, and said to him, “Mr. Hendee, I desire that you see that my name is properly entered as voting No.”

Q. Did Mr. William Mainland vote? A. My best recollection is that he did not, because I have no recollection of his voting at all, and as chairman it was not customary for him to vote except to break a tie—

well I won't say it was not customary because we had not been there enough to establish a custom; that is my impression, he did not vote, because he was chairman; to the best of my recollection he did not vote. I just want to say one thing more in this connection; before I voted I said to Mr. Wickes, "Let me see that contract," and he had the contract in pamphlet form, typewritten and done up in blue covers he had quite a large number of them lying around there, and I said to him, Mr. Wickes, let me see that contract; and he threw it across the table to me. I kept the copy that he threw across the table to me, and I have it in my hand."

The copy was then offered and received in evidence and is as follows:

Interveners' Exhibit No. 1.

Kissel, Kinnicutt & Co.

Parties of the First Part

Idaho-Oregon Light & Power Company,

Party of the Second Part,

W. & S. Mainland,

Parties of the Third Part.

AGREEMENT

Dated September 1912.

Agreement made this day of September, 1912, between Kissel, Kinnicutt & Company, herein-after called the "Bankers," parties of the first part,

Idaho-Oregon Light & Power Company, a Maine corporation, hereinafter called the "Oregon Company," party of the second part, and W. & S. Mainland, a firm transacting business in the city of Oshkosh, Wisconsin, and composed of Messrs. William and Sinclair Mainland, hereinafter called the "Mainlands," parties of the third part.

WHEREAS, under date of September 19, 1911, the parties hereto entered into a contract in writing whereby, among other things, the Bankers obligated themselves to purchase of the Oregon Company one million five hundred thousand dollars (\$1,500,000.00) face value of the Oregon Company's Consolidated First & Refunding Mortgage Six per cent. (6%) Gold bonds at eighty per cent. (80%) of the face value thereof, and

WHEREAS, pursuant to the terms of said contract the Bankers have purchased to the present date one million three hundred and twenty-five thousand dollars (\$1,325,000) face value of said bonds leaving to be purchased the further amount of one hundred and seventy-five thousand dollars (\$175,000) face value thereof, which purchase at the said contract price would net the Oregon Company the sum of one hundred and forty thousand dollars (\$140,000) in cash and no more, and

WHEREAS, the Oregon Company will require during the next six months for its corporate purposes the sum of two hundred and fifty thousand dollars (\$250,000), and

WHEREAS, although the Bankers are ready and willing to purchase at the said contract price said one hundred and seventy-five thousand dollars (\$175,000) face value of said bonds, but are unwilling to purchase any further amount of said bonds, and

WHEREAS, the Bankers have offered to procure for the Oregon Company upon the terms hereinafter expressed, the said sum of two hundred and fifty thousand dollars (\$250,000), in consideration of the Bankers being released from their obligation to purchase said one hundred and seventy-five thousand dollars (\$175,000) face value of said bonds, and

WHEREAS, said offer has been accepted by the Oregon Company,

NOW, THEREFORE, in consideration of the premises and the mutual covenants hereinafter expressed, it is agreed by the parties hereto as follows:

First: The Bankers agree to procure Idaho Railway, Light & Power Company, a Maine corporation, hereinafter called the Railway Company, to loan to the Oregon Company the sum of two hundred and fifty thousand dollars (\$250,000), or any part thereof, with interest thereon at the rate of six per cent (6%) per annum, of which one hundred thousand dollars (\$100,000) shall be loaned forthwith, and the balance thereof, whenever requested by the Oregon Company (such request, however, to be made within six months of the date hereof, and if not made

within such period the obligation of the Railway Company to make the balance of the loan not so called for to cease and determine), each loan, when made, to be for a period of six (6) months from the making thereof, to be secured by an amount of the Oregon Company's said First and Refunding Mortgage Gold Bonds, bearing interest at the rate of 5% per annum, equal at their face value to twice the amount of such loan, and to be further secured by a promissory note in form as follows:

(Note)

Second: As further consideration moving from the Oregon Company to the Railway Company for the making of this loan, the Oregon Company shall on demand of the Railway Company deliver to the Railway Company, such amount not to exceed \$500,000 face value of its said First and Refunding Five per cent Gold bonds as the Railway Company may from time to time demand, upon receiving in exchange from the Railway Company an equivalent amount of the Oregon Company's Consolidated First and Refunding Mortgage Six per cent (6%) Gold bonds, now owned by the Railway Company, provided, however, that there are or may be made available to the Oregon Company a sufficient amount of its said First and Refunding Five per cent. gold bonds to satisfy such demand, and that First and Refunding Bonds to the amount of said demand are available to the Oregon Company.

IN WITNESS WHEREOF, the party of the second part has caused these presents to be executed in

its corporate name by its President thereunto duly authorized, and its corporate seal to be hereto annexed, and the parties of the first and third parts have hereunto set their respective hands and seals, as of the day and year first above written.

In the presence of:

“My recollection is that Mr. Wickes read the contract when he came to it in the proposed minutes, that is my best recollection. This contract was thrown across the table to me by Mr. Wickes before I voted. This contract does not contain the form of the note, but it simply says, when it reaches that part of the contract, “Note.” I asked Mr. Wickes to see the note and he handed me across the table a copy of the proposed note. I looked the note over, read it. Mr. Wiggin said to me, “is that all right, Mr. Thompson?” And I said “I dont see any objection to it under the circumstances; it is what we speak of out west as a cut-throat note, but I understand that all you bankers insist upon that kind when you lend money upon collateral.” Now that is the conversation which Mr. Wiggin had confused in his mind when he says that I approved the contract.

Referring to the minute record stating that the chairman presented the agreement, the chairman did not in fact present such agreement but it was done by Mr. Wickes. “After we had gone through Mr. Wickes’ proposed minutes, quite a number of the directors arose from their seats as if to go. Mr. Wickes said: “Hold on, we are not through yet, there is a meeting of the Railway Company.” And it was get-

ting along late and quite a number suggested they wanted to catch their train or that; it is quite a custom I have found in New York for men to want to get away at five o'clock to catch trains to go home. And so Mr. Wickes picked up another set of minutes, proposed minutes, which I discovered soon were the proposed minutes of the Railway Company board of directors and he hustled along through them, and as he come to anything he would say, "that is just the same as the other meeting," and when he struck this question of the contract, somebody asked him, "Is there any difference between that and the other?" and he says, "Nothing substantial." He says "I can just enter that on the record from the other." And I said to him then, "Mr. Wickes, don't you fail to enter our votes just the same." And those minutes were rushed through in a very short time, and Mr. Wiggin jumped up and started for the door, and Mr. Mainland says, "Come back Mr. Wiggin I have a little matter I want to bring before the board, and I would like to have you all present." Mr. Wiggin came back to his chair, and Mr. Mainland then suggested the appointment—I don't know as he suggested the appointment of a committee—the board took up the matter of the complaints which the Mainlands were making against Mr. Watson and his management of the business, and hurriedly a committee, as I understood, to investigate Mr. Watson, was appointed and we adjourned."

The proposed contract was not executed at that time, but sometime after the 1st of November, 1912,

"Mr. Mainland submitted the question of the execution of that contract to me and gave me certain papers and I examined it and gave him an opinion. Before I gave him an opinion, or before I would give an opinion, I insisted on seeing the minutes of the meetings of the companies, September 25, 1912. When I left the meeting I asked Mr. Wickes for copies, but he said he would send them to me, and he was another fellow that wanted to get away at five o'clock every day, and he didn't send them to me, so I telegraphed him for them, and he sent me certain papers claiming to be minutes of those meetings, and I have those minutes here that he sent me, and there is the letter that came to me from Mr. Wickes enclosing the minutes."

The letter referred to was offered and received in evidence, and is as follows:

Interveners Exhibit No. 2.

Crocker & Wickes
Frank L. Crocker
Forsyth Wickes

Hanover Bank Building
5 Nassau Street,
New York, October 17, 1912.

Idaho Railway, Light & Power Company
Idaho-Oregon Light & Power Company,

Dear Sir—

I am in receipt of your telegram of October 16th, advising me that Mr. Mainland is out of town and that you have withheld O. K.'ing the execution of

the agreements in question until you have received copies of the minutes of the two board meetings held September 25th. I have been holding these minutes up because, first, there were certain exhibits to be annexed thereto, of which I have not yet received revised copies from the West, and, second, because I did not know what position the Messrs. Mainland were going to take with respect to the execution of the two agreements. However, I enclose herewith the minutes in question prepared on the theory that the Messrs. Mainland approve both agreements and omitting the exhibits which I mentioned.

I trust these papers will enable you to advise your clients at your earliest convenience.

Yours very sincerely,

FORSYTH WICKES.

A. E. Thompson,

Oshkosh, Wis.

W. S.

Enclosure:

Mr. William Mainland received from me on the 25th day of October, 1912, or later, my opinion to him on the questions arising as to the signing of this contract. I do not remember the date I gave it to him, but my opinion is dated October 25th. I was in New York on the first of November, and Mr. William Mainland was there. Mr. William Mainland signed the contract for William and Sinclair Mainland on the first of November. As the firm of William and Sinclair Mainland. Mr. Mainland

as I understand it, declined to sign it for the Company as President. For the Idaho-Oregon Company. When Mr. William Mainland signed the contract for W. & S. Mainland, it had been signed by nobody else. On the 1st day of November, 1912, I left that contract with Mr. Wickes, it was to be delivered only upon condition that certain things were done by the Bankers, I delivered the letter of instructions to Mr. Wickes at the time. When it was signed by Mr. Stacey as Vice president I don't know. Q. Mr. Stacey Richmond? A. Mr. Stacey Richmond as Vice President. I do not know. I have one of the original contracts in my possession, it shows who signed it, but it don't show when it was signed, but it was not signed until November 1912.

Witness said prior to the meeting of September 25th 1912, he had never heard of the proposed exchange of bonds until Mr. Wickes read it from the proposed minutes. The only explanation which he remembered was Mr. Wickes reading from the minutes: "Mr. Watson made a statement as to the financial condition of the Company and in conclusion recommended the raising of \$250,000 to meet the requirements of the Company for the next seven months." He had no recollection of Mr. Watson in fact making any such statement. That was as much as he could say. So far as he could recall the only reference to the matter was in the reading of the minutes by Mr. Wickes. He had not heard of the question of the Company's need of \$250,000 or the

financial scheme disclosed discussed at all; he did know that "They were using lots of money and that they probably needed money, but I never heard any plan discussed as to what it was for, either as director or individually."

With respect to the minutes referring to the Executive Committee he stated that "There was never any nomination, and there was never any ballot, and I don't believe from my best recollection that even that clause was read by Mr. Wickes. My best judgment is, it was either accidentally or designedly omitted. And in explanation I want to say that we were there, the Mainlands and myself at that time, to object strenuously to the further services of Mr. Watson in the capacity of a member of the Executive Committee or Managing Director. One of the things that we did in New York at that time was to get this committee appointed and present our charges to it, and if I had heard a proposition to re-elect Mr. Watson I am sure I would have been on my feet in a minute opposing it."

With respect to the minute of December 27, 1912, and the Bates & Rogers settlement referred to therein, he said: "There was a settlement with Bates & Rogers I know by report from Mr. William Mainland at about the time it was made, but so far as any agreement for an exchange of bonds, I never heard anything about it until within last ten days."

On Cross-Examination by MR. MACLANE witness said:

He had been counsel for the Messrs. Mainland for several years and was counsel for the Power Company until the New York interests took over the management, under the contract with the Bankers of September 19, 1911, and while he was never removed he "Kind of gradually oozed out and by the 1st of January, 1912, had nothing more to do with it." He was still under retainer of the Idaho-Oregon by its President, since February, 24, 1913, when the Directors of the Idaho-Oregon resigned. Otherwise than that he had no connection with the Power Company during the years 1912 and 1913, except as Director, unless by some special employment.

With respect to the source of his knowledge of the affairs of the Company he said "Well I got more information from Mr. Mainland, either one or the other of them, than from any other one source, but I was in New York I could say a half dozen times that year; I chatted with Mr. Bisbee whenever he had time and would let me, and I chatted with Mr. Fuller whenever I got a chance." He did not attend to exceed two director's meetings, during the period from August 1912 to August 1913; had no personal recollection of being present at any other meeting of the Idaho Oregon, except that held on September 25th 1912, he knew nothing of the financial requirements or affairs of the Company, as it was no part of his business. He knew "they were spending money like drunken sailors and I couldn't help it, and that was all there was of it." He knew a little about the Company's expenses from access

to the Company's monthly reports which had been submitted to him; and he got some information out of them although he did not know whether he could go over such reports intelligently without the aid of an accountant.

When the Board of Directors was increased to eleven, an Executive Committee of five members was elected, in whose hands the affairs of the Company were "Theoretically; practically not, Mr. Watson and Mr. Fuller were the whole thing." The purpose of the Committee was to do away with the necessity of calling such a large board of directors together at frequent intervals; he did not know how many meetings of the Executive Committee had been held.

At every meeting of the Board of Directors which was held, Mr. Wickes had proposed minutes written up just as at this meeting; that was their manner of doing business and Mr. Wickes ran the whole thing. The witness then continued as follows:

"Q. Opportunities were afforded for discussing any of those questions which a person cared to discuss? A. Sure, there was no objection to a man talking if he wanted to; that is why I got to be persona non grata to Mr. Fuller, because I would talk. Q. And when resolutions were prepared and offered, opportunity was afforded for affirmative and negative votes? A. No, not unless objection was made; he read right along and if nobody said anything it passed right along as adopted, no vote was taken unless somebody wanted a vote. Q. And

this particular matter to which you refer, however, as there was some objection a vote was taken? A. A vote was taken, yes sir. Q. You recall quite distinctly, do you, that Mr. Wickes made the suggestion that Mr. Fuller do not vote? A. He read it right from the minutes, proposed minutes. Q. You don't recall Mr. Fuller's making the suggestion himself? A. Yes, sir, Mr. Fuller repeated it after him; after Mr. Wickes read that, Mr. Fuller repeated it after him, and stated that he was a member of the firm of Kissel, Kinnicutt & Company and interested—the minutes did not show that he was a member, as I remember it, when he read them, it simply showed, "except Mr. Fuller's vote which was not cast," and Mr. Fuller made the explanation that he was a member of the firm of Kissel, Kinnicutt & Company. Q. And Mr. Mainland suggested that he too did not care to vote? A. It did not come just that way; when Mr. Fuller said that, Mr. Mainland blurted out "Me too," and then turned to me and the conversation took place in a whisper that I have testified it. Q. As the minutes now show that Mr. Sinclair Mainland also did not vote, they were written to accord with that fact after the meeting? A. That was done evidently after the meeting, but as I say, the minutes should have shown that Mr. Sinclair Mainland and myself voted No. Q. You stated I believe, that you had heard no discussion prior to the meeting in regard to this question of the bond exchange? A. I never heard of it, no. Q. Now you spoke among other things of Mr. Wickes

throwing a contract across the table to you, do you mean to imply that he did it discourteously? A. No, I asked for it and he just slung it across the table, nothing discourteous. Q. Didn't signify any desire that you should not see it or read it? A. Not at all, Mr. Wickes—there never was anything discourteous between us. Q. In connection with the statement that appears in the minutes that Mr. Watson stated that \$250,000 in money was required, did anybody present as far as you recollect make any request for the details of that statement? A. I have no present recollection that they did. Q. It was just assumed that since the management had stated that that money was required, that it was required? A. I don't know what anybody else presumed, everything had gone along smooth, just reading away, read away until he struck that question of the resolution adopting the contract; there is where— Q. Then there was some little discussion? A. Then there was some little discussion. Q. You were sitting with your back to Mr. Hendee during that meeting weren't you, most of the time? A. No I was sitting with Mr. Hendee about 5 feet, 4 or 5 feet distant from me; he was behind me and at the left of me on an angle with the table of about 30 degrees. Q. With respect to the manner in which these meetings were conducted some of the gentlemen upon this board of directors, Mr. Wiggin and Mr. Sabin and one or two others, were, or claimed to be, pretty busy men and always in pretty much of a hurry, didn't they? A. They were always in a

hurry; I don't believe they would have come at all if it wasn't for the \$20. and they didn't take any part, as a rule, in the meeting at all; they sat there, when a vote came they voted, but they seldom entered into the discussion. Q. They were desirous that the meeting should be facilitated? A. That is the way it appeared. Q. Mr. Thompson in stating the position of some of the directors present at that meeting, you do not mean to contradict the record as to the persons who were present? A. No, sir."

The minute of election of officers was read from the prepared minutes in the same manner as other resolutions but there was no suggestion of any other officers and the list was satisfactory. "There was never any ballot of the election, just as he read it and by our silence gave our consent." The persons shown to be elected as Executive Committee by the minutes were the same persons who had previously served on that Committee; no change was made. He felt, however, that there could have been no election of an Executive Committee as recited in the minutes, because Mr. Watson was not satisfactory to the Mainlands, and he felt that they would not have consented to elect him for a year at that time.

MR. CUMMINS read the deposition of *Mr. William Mainland*, taken on behalf of the interveners at Oshkosh, Wisconsin, June 3, 1914. Mr. Mainland testified as follows:

His business is that of operator of public utilities. He was President and Director of both the Idaho-Oregon Light & Power Company and of the Idaho

Railway, Light & Power Company, and had been connected with the Power Company since its organization in 1907. He and his brother Sinclair were instrumental in such organization and were officers, directors and managers of the property down to September, 1911.

He was director of both the Power and the Railway Companies on September 25, 1912, and was present at the meetings of the directors of those companies held in New York at the Chase National Bank on that day, and presided at the meetings. He did not recall any election of an Executive Committee having been held at that meeting although there might have been. The meeting was conducted by the reading of minutes previously prepared by Mr. Wickes, counsel for the Company. He was quite clear that there was no election or ballot taken on the election of an Executive Committee, and their frame of mind towards Mr. Watson's management of the Company was such that an election of an Executive Committee would have made an impression.

He did not present the proposed agreement for the loan of \$250,000.00 and the exchange of bonds, nor did he vote on the proposition, but he understood that Mr. Sinclair Mainland voted in the negative; that is, that his vote "had a negative effect." He did not remember the language. Mr. A. E. Thompson voted against the resolution. Witness did not recall having heard of the proposition for the loan and exchange of bonds until it came up in the meet-

ing, although he was President of the Company, but the financial condition of the Company had been discussed prior to September 25, 1912. A meeting of the Executive Committee was held at which the financial situation of the Company was discussed in Boise in the summer or fall of 1912. On identifying the minutes of the meeting held at Boise on August 30th hereinbefore inserted in this record, the witness recalled the action there mentioned having been taken and said: "The question of this additional money, of course, was very vital; the manner in which it might be raised was considered. I made the suggestion that we had not taken down any of the first and refunding five's for quite a period of time while we had gone on and spent money for extensions, meters, etc., exclusive of the Ox Bow development, and we were entitled to that (to take down more bonds) regardless of the Ox Bow requirements." It was considered that such bonds "would be available to raise money either by selling or pledging. I only had a rough guess, but I was under the impression, and I am sure I stated to Mr. Fuller, that there must be some five or six hundred thousand dollars of bonds available for improvements already made * * * * In addition to what might be in the treasury * * * My own opinion was that, without having the figures before me, there was in the neighborhood of possibly less than a million dollars, from eight-hundred fifty thousand dollars to a million dollars; I was not certain about that and am not now as far as that goes."

Mr. Markhus, as Manager of the Company got up the statement referred to in the minutes, but he did not recall that it had been sent to him prior to September 25, 1912, nor had it ever been received or considered by him or by the Executive Committee up to that date. From the witness' view point this two hundred fifty thousand dollars was not sufficient to meet the Company's requirements, or put it on a secure basis, his contention being that the Company needed additional power, and that sum was not sufficient to produce it. He did not recall any specific statement as to what should be done with the \$250,000, except that it was for general corporate purposes, some of the money having already been spent. The statement was not sent to him as President of the Company because all communications, unless otherwise instructed, were sent by Mr. Markhus to Mr. Watson.

Following the meeting of September 25th witness was in New York for several days and had conferences with Mr. Fuller and the matter of the exchange of bonds was discussed. Mr. Fuller made the statement "in effect if not words, that in case of trouble for the Idaho-Oregon that he would be in a better position having those bonds. I don't know that he said Railway Company or himself. He was spokesman, and I presume the Railway Company." Mr. Fuller had repeatedly said that Mr. Watson was a member of his firm, and, in the opinion of witness, Mr. Watson was acting under the direction of Mr. Fuller who was the manager of the syndicate which had charge

of the operation of both companies, and upon whom they were absolutely dependent for funds. He felt that on financial affairs, and even upon some operating affairs, Mr. Fuller was the man who had to approve and pass on expenditures, and Mr. Watson was Fuller's selection as a member of the Executive Committee.

Witness conducted negotiations on behalf of the Power Company with Bates & Rogers in the latter part of 1912 for the settlement of their differences, and arranged such a settlement. In this connection he said:

"Negotiations were carried on before I got into it by Mr. Wickes, and in fact it had got to a point where the two attorneys, that is, Mr. Rogers brother in New York and Mr. Wickes, had the matter up for adjustment, and I had nothing to do with it for a number of weeks, I have forgotten just how many, and finally unbeknown to me, Mr. Rogers called up one day and said he was coming up here to see me if I was going to be home; he said he didn't want to go into a law suit if he could avoid it, and he came up unbeknown to his attorney in Chicago, who if he knew it would probably called him a fool, and in fact went so far as to say that his attorney said he thought the officers in the company were trying to avoid service, and he said before starting any action he wanted to come up and talk heart to heart as he put it, and see if he could not adjust matters. At that meeting I said, "Mr. Rogers this matter is, as you know, in your brothers hands as attorney; it is

in Mr. Wickes hands; I do not want to butt in." Well, he says, whatever you say is not official, I will consider it such, and what I say is not official. And we had a discussion then about the settlement. Q. During Mr. Wickes negotiations, as I recall it, he had suggested more bonds, more than 25? A. More than 25, and no stock, and I said, what is the use of putting up so many bonds if you are going to redeem them anyway, no use tying that additional bonds up. And Rogers and I discussed Consolidated bonds and the First and Refunding bonds and the stock proposition, the shares of stock, and he said what about the first mortgage bonds, he would consider taking those as he still believed in the project, etc. And I said I don't think you can get any of those, I don't believe so, but it is possible that you might get the Railway to guarantee, which I had in fact discussed with Mr. Wickes before that, I did not tell Rogers though; and before going away he said, if you can put that trade through as it appears, I believe I will accept it; and of course he asked me what my judgment was on the Railway guarantee, and I said to him I believed that was all right, that was the Bankers Company, anyway so-called, as we used to call it the Bankers Company, and I believed he was not taking anything except a business risk, or words to that effect; I don't believe he was taking any risk; that is about what I said, and I didn't agree with him that I would put that trade through, I said, I will simply submit it; he urged me to come to New York, and I went to New York as I recall it,

within a few days from the time I had the interview with Rogers, and submitted this proposition to Mr. Wickes and Mr. Fuller."

The witness continued: "Mr. Fuller refused to give Bates & Rogers first mortgage bonds because he said their claim was not good against a company that ought to be in the hands of a receiver, but if they would accept the consolidated bonds as provided for he would recommend that trade. Mr. Rogers said he would consider seriously accepting the first and refunding bonds at the regular sale price, but absolutely refused to take the consolidated bonds without a guarantee." Nothing was said in the interview by the witness and Fuller as to the Railway Company getting a further exchange of bonds as compensation for the guarantee. With respect to the meeting of the Executive Committee as shown by the minutes of December 27th, witness said that his attention being directed to the entry of the Bates & Rogers settlement in those minutes: "I say unequivocally that I have no recollection of that; in fact I did not know there was such a record in existence until I read it yesterday in that minute book; I have always been under the impression that there was just a trade of \$500,000., put through and then by purchase or otherwise there had been an additional \$218,000."

"Q. You were entirely unaware until within the last two or three days that there had been a second trade for a second \$500,000 agreed to? A. Absolutely, to the best of my recollection I have always

had \$500,000., in my mind as being exchangeable up to \$500.000."

In negotiations with Bates & Rogers Mr. Wickes had stated that if the settlement was not taken as proposed by him the Company would go into the hands of a Receiver and prior to that Mr. Watson himself had stated several times that he had used as an argument both, in the proposed settlement with Bates & Rogers as well as in negotiations with Mr. Nunn, that the Company might have to go into the hands of a Receiver. Witness found fault with these statements and said that it was not good argument, but Mr. Watson admitted having made the statements and witness protested to Mr. Fuller about it and said that he was very much annoyed.

He thought that a revised draft of the contract of September 25th was presented to the Executive Committee or Board subsequent to September 25, 1912, but was not clear on the subject. He did not think there was any meeting between September 27th and December 27, 1912.

On Cross-Examination by MR. MACLANE the witness said:

Prior to September 1911, he and his brother Sinclair, as the firm of William & S. Mainland, were in charge of the Power Company subject to the action of the Board of Directors. They were the organizers of the Company and had very large complete executive charge and control up to that time. The board of directors consisted of five until the New York

interests came in, when the by-laws were amended to provide for eleven, and at the same time provision was made for the election of an Executive Committee, which, until September 25, 1912, was composed of Messrs. Fuller, Wiggin, Watson and W. & S. Mainland. It was the same Committee which was shown by the minutes of September 25th, to have been re-elected. The Committee had frequent meetings at many of which the witness and his brother were present.

Mr. Watson ceased to be Managing Director of the Power and Railway Companies about May 1, 1913, and the firm of W. & S. Mainland succeeded to the management in Mr. Watson's place, subject to the co-operation and direction of the Board, with substantially the same or some increase in salary over that of Mr. Watson. He did not know what the relations between Mr. Watson and Kissel, Kinnicutt & Company were other than Mr. Fuller's statement. His office was separate from that of Kissel, Kinnicutt & Company, but in the same building, and his name, so far as known, did not appear on Kissel, Kinnicutt's letter heads, nor did witness ever discuss Watson's relations with any other member of Mr. Fuller's firm. He never knew where the suggestions originated, with Mr. Watson or Mr. Fuller, and his complaints of the management were directed entirely against Mr. Watson rather than Mr. Fuller, because Watson was the Managing Director.

Referring to the meeting of September 25th, 1912, witness acted as Chairman and ordinarily put mo-

tions or resolutions calling for aye and no vote, and his recollection was that he did so in connection with this resolution and, while he had no independent recollection, yet, in the ordinary course of business he would say that he would declare such a motion carried if he thought it was carried. Meetings of the Company were usually held by common consent according to pre-arranged program, in order to facilitate business, and so far as he knew no director was ever refused an opportunity to express himself fully on any subject. He did not remember at the meeting in question any adverse discussion, except if what was said by Mr. Thompson and Sinclair Mainland in that their votes implied a negative might be considered adverse, saying: "My recollection about Mr. Thompson's statement was that he said this was all new, and he could not vote independently for it, and he thought it was a matter of a good deal of importance and ought to be discussed, and he objected to it to that extent. I don't know as that is his language, but that is the substance, and we felt, I know I felt, if that was Mr. Fuller's wish to have that thing go through it was no use of us fighting over the thing because there was enough votes to carry it." For that reason he did not make any fuss over the matter, and, to the best of his recollection, he had not heard of the proposal for the exchange of bonds until presented to the meeting at that time, nor did he remember of ever seeing such contract or hearing it discussed. But, from previous discussions, he knew at the meeting that the Company

was in need of money for its corporate purposes; that it always needed money and capital.

With respect to the Bates & Rogers transaction, witness signed some contract for the exchange of bonds, but does not recall what the contract was. He did not recall having seen the minutes of December 27th until the day before his deposition was taken, and it was a great surprise to him because he was under the impression that there was just one transaction for the exchange of these bonds. He knew that there had been a resolution for the exchange of 500,000 of bonds but did not know the time or the facts as to the physical transfer of the bonds and wondered where the 218 additional bonds came from. He had absolute confidence in the integrity of the New York gentlemen associated with the enterprise, and felt it would be almost a reflection on Mr. Fuller and his associates to ask about such matters, and, as a matter of fact, in inquiring about other things he never could get much satisfaction. Presumably he signed as President the notes authorized in the transaction of September 25th, and further recalled the fact that there was an agreement between his firm and Kissel, Kinnicutt & Company for mutual release and discharge of obligations although he did not remember the date.

On Re-direct Examination by MR. CUMMINS witness stated:

From 1907 to 1911 there had been issued and sold something less than two and one-half million dollars of the Power Company's First and Refunding bonds.

He was familiar with and had charge for the Company of the marketing of those bonds through various bankers, and in his opinion in the fall of 1912, the first mortgage five per cent bonds of the Company then subject to certification could have been sold at a fair price to produce the funds needed by the Company. So far as he knew no effort was made by Mr. Fuller, Mr. Watson, or any of the other New York people in charge of Company at that time to sell or market such bonds.

MR. CUMMINS then read the deposition of Mr. Sinclair Mainland taken on behalf of the interveners at Oshkosh, Wisconsin, on June 3, 1913. The witness testified as follows:

He had been associated with Mr. William Mainland in the Power Company from the time of its organization and had been a director of that company during the entire period and became a director of the Railway Company upon its organization and had continued so to be. On September 25, 1912, he was director of both companies, and was a member of the Executive Committee of both companies, and was present at the meeting of the directors of the Power Company held on September 25, 1912. He did not recall having any information on the subject of the proposed release of the bankers from further purchase of consolidated bonds or the exchange of bonds by the companies prior to the meeting, and to the best of his recollection it was a surprise to him at that time. The question was put to a vote and he voted "No." Mr. A. E. Thompson likewise voted

"No" and Mr. William Mainland did not vote. He was in New York for some days after the meeting and had some discussions with Mr. Fuller as to his reason for opposing the exchange. Mr. Fuller was very careful about not giving reasons, but said it would put them, or the Railway Company, in much better shape to have those bonds in case of trouble in the Idaho-Oregon. He said that it was also for the interests of the Mainlands, and witness said that while they were anxious to conserve their own interests that they were more anxious to conserve the investments of the Power Company to the innocent purchasers of securities. They were willing to sacrifice themselves, but wanted the securities and the innocent purchasers saved. He could not say from his own recollection that he remembered the meeting of the Executive Committee of September 27, 1912, but undoubtedly there was such a meeting because he was in New York at the time.

He did not sign the minutes of December 27, 1912, and they appear in the records as not signed. He did not recall having seen the record of that meeting until the day before his testimony. He first learned of the agreement for the exchange of bonds in consideration of the settlement of the Bates & Rogers controversy only within a few days prior to the taking of his deposition. He did not recall having had any information as to additional bonds having been traded or put out as stated in those minutes.

He was familiar with the market for the Idaho-Oregon bonds during the period of their sale, and as-

sisted in such sale, and he believed they could have been sold in the fall of 1912 at a fair price, and he urged upon Mr. Fuller to take that action. Mr. Fuller settled the matter "by a wave of his hand, didn't seem to be considered, didn't seem to satisfy his purpose." He had no knowledge of Messrs. Fuller, Watson, or any of the New York interests, having endeavored to obtain a market for the bonds or dispose of them in the fall of 1912, and from his conversation with Mr. Fuller he was of the opinion that the latter did not want to do it.

Subsequent to January 1, 1912, either Mr. Watson or Mr. Fuller was the person in actual control of the Power Company's affairs. He did not know whether Mr. Watson had any financial interest in the Company or not but he believed he was not a stockholder in any considerable amount. Mr. Fuller was Manager of the syndicate which had been formed to provide funds for the Railway Company, and for the purchase of the Power Company's consolidated bonds.

On Cross-Examination by MR. MACLANE, witness stated:

Prior to the time Mr. Watson took charge of the Company's affairs, the firm of W. & S. Mainland composed of his brother and himself, had actual charge of the Power Company, and they succeeded Mr. Watson as Managers of the property, subject to the Executive Committee and the Board, upon Watson's retirement, which occurred about May 1, 1913.

With respect to the Executive Committee meeting of December 27, 1912, witness was in New York about that time, and did not doubt but there was a meeting of the Executive Committee then. He also remembered the Bates & Rogers settlement and believed the Executive Committee did act on it either formally or informally. He did not remember from independent knowledge the date of the meeting, but he recalled having been at the Chase National Bank at several meetings, "and we undoubtedly met at the Chase Bank on some business, because my records show that I was in New York." He remembered taking up at that time in an Executive Committee meeting the question of rates for Boise lighting to meet the Beaver River competition, and discussed the question quite freely. If he was talking from memory he would say that that was discussed among the directors of the Idaho Railway instead of among the Executive Committee of Idaho Oregon.

With respect to the meeting of September 25, 1912, his recollection was "that when Mr. Wickes said that Mr. Fuller, being an interested party, was not going to vote, I sat across the table and I said "Well, I won't either," then I turned to Mr. Thompson and we had a little whispered consultation and we decided it was time to vote against things that we were not familiar with, and personally that, I felt, was a job to get something for nothing and I voted "No." My recollection is perfectly distinct." He further stated that that was his personal feeling in the matter, but that he knew the Company was

in need of funds at the time, and the question of financial needs had been a matter of frequent discussion between the responsible officers of the Company. The witness saying: "It is a matter of frequent discussion, I believe, in every business, including the New York central, that they need further funds for their business, and probably we discussed the need of funds when we met."

MR. CUMMINS then read the deposition of CHARLES E. RANSTEAD taken on behalf of the interveners at Chicago, Illinois on June 14, 1914. The witness testified as follows:

He was in the bond business in Chicago from 1908 to 1912 inclusive as a member of the firm of Charles M. Smith & Company of that city, which firm purchased and sold a number of bonds of the Idaho-Oregon Light & Power Company during that period.

The witness produced a tabulation showing purchases by the firm of Charles M. Sabin & Company, of Chicago, of Idaho-Oregon Light & Power Company First & Refunding Bonds from October 12, 1908 to August 8, 1912, and sales between November 11, 1908, and September 13, 1912, showing in each case the amount of the sale, the date, the price, and in case of sales whether sold to a private investor or to a dealer. It is stipulated that this schedule may be received in evidence and made a part of the testimony of the witness as showing purchases and sales of said Bonds as therein shown.

Schedule referred to and produced by the witness is as follows:

Bought.

\$25,000. at 85 and 30% stock bonus.....	10-12-08
10,000. at 85 and 30% " "	12-10-08
10,000. at 85 and 30% " "	12-15-08
10,000. at 85 and 30% " "	1-18-09
45,000. at 85 and 30% " "	4-12-09
2,000. at 93	12- 2-11
2,000. at 93	12- 7-11
5,000. at 93	12-16-11
2,000. at 93	12-19-11
2,000. at 93	2-14-12
5,000. at 93½.....	3- 4-12
7,000. at 95	6-29-12
10,000. at 95	8- 6-12
26,000. at 91½.....	8- 8-12

Sold.

\$ 1,000. at 99	and 10%	stock bonus	private	11-11-08
10,000. at 94	" 10%	"	private	12- 8-08
6,000. at 95½	" 10%	"	private	12-31-08
3,000. at 96½	" 10%	"	private	1- 8-09
2,000. at 99	" 10%	"	private	1- 9-09
1,000. at 97½	" 10%	"	private	1-20-09
1,000. at 98	" 10%	"	private	3-16-09
1,000. at 98	" 10%	"	private	3-25-09
2,000. at 94	" 10%	"	private	4- 1-09
5,000. at 94¼	" 10%	"	private	4- 7-09
5,000. at 97	" 10%	"	private	4- 9-09
3,000. at 96	" 10%	"	private	4- 9-09
3,000. at 96½	" 10%	"	private	4-12-09
5,000. at 94¼	" 10%	"	private	4-27-09
42,000. at 89½	" 25%	"	dealer	4-27-09
2,000. at 95½	" 10%	"	private	5-15-09
5,000. at 97½	" 10%	"	private	6-10-09
1,000. at 98	" 10%	"	private	7- 6-09

Sold—Continued.

\$ 1,000. at 96½	and 10% stock bonus	private	7-24-09
1,000. at 97	"	private	1- 5-10
4,000. at 93	"	dealer	12- 4-11
7,000. at 93		dealer	12-28-11
10,000. at 94¾		dealer	7-30-12
3,000. at 94¾		dealer	9-13-12
<hr/>			
124,000.			

All of the foregoing sales were of six per cent bonds. A five per cent bond having the same security the witness thought would be equally saleable upon a normal price ratio. That is, the price paid would be reduced to a greater amount below par to make the five per cent bonds sell on the same basis as the six per cent bond would sell for having the same maturity.

On Cross-Examination by MR. MACLANE, the witness said:

Neither he nor the firm of Smith & Company were still in the bond business. The firm was still in existence, but had not been actively purchasing or selling bonds for about a year prior to the date of his deposition. The firm aimed to handle the best securities but handled a few irrigation bonds. They did not specialize in sales of Idaho-Oregon bonds. The sales testified to were made in the ordinary course of business, but about \$100,000, of the bonds they sold were purchased direct from the company during the period from October 1908 to April 1909 at 85. In making the purchase they used the statements of earnings, engineer's reports and all other information which could be gotten. These statements showed that at that time the company was making some surplus in addition to its bond interest, and they relied on the amount of bonds stated in the reports to have been certified and outstanding.

The witness further testified as follows:

"Q. Assuming that there was approximately \$2,-500,000, of these bonds out, and the audits of the

Company, which you saw and on which you relied, showed these facts, the engineer's reports show physical valuations and operating conditions generally which bear some relevancy to that issue—now assuming that \$500,000, more of bonds are certified and issued and offered to be sold by the Company without any substantially different showing as to earnings, or without any substantially different showing as to the amount of property which the Company has, the Bonds being certified on expenditures previously made—what would you say as to the salability of those \$500,000 additional bonds issued under those circumstances? A. On the basis of the reports that we had I cannot readily see how the amount of bonds equivalent to \$500,000 would be issued under the circumstances that you state without having an increase in earnings to offset the large increase in interest charges. But if an amount of bonds like that was issued and there was not an increase of earnings proportionate to the increase in the investment, I should say that someone had blundered some place or else someone was dishonest.

Q. And not necessarily a careful, but a responsible bond house would hesitate to buy or offer for sale such bonds, would it not? A. Under those circumstances it would require careful investigation. Q. These bonds were all issued and sold on the statement and the assumption which was a fact at the time, that this Company was operating in non-competitive territory—is it not true? A. Our understanding was that there would be practically no competition

for the company. That was the general understanding among the bond purchasers—among bond men and engineers who had investigated the property.

Q. Now, suppose that in offering these bonds for sale in the fall of 1912, any time subsequent to September 25, 1912, it were stated that competition was anticipated in the territory commencing approximately the 1st of January, or that a competitive plant had extended its transmission lines into the City of Boise, and had obtained a franchise from that time, and had secured already in the city a number of contracts to serve customers at rates approximately 40 per cent lower than the rates then obtained by the Idaho-Oregon Company, on which its earnings were based, how would that have affected the salability of these bonds? A. Under the circumstances, I do not think that is a proper question at this time for the reason that what we did in connection with the purchase and sale of these bonds was based upon facts actually existent long prior to September, 1912, and I am sure that it would have been difficult to sell them after the manner in which the Company had been managed. We were ignorant of the earnings of the Company and also of how it was being managed. After that time, although we were endeavoring to get information, we could not get it; nobody would furnish us any information, so that so far as we were concerned, or I am concerned, I cannot say that you could have sold the bonds at any price to anyone who actually knew the facts. Q. I think possibly you misunderstood my question. I am not

criticising your sales of these bonds at all, I am not even asking about the sales of the particular bonds which you made. Assuming the facts stated in my previous question, and assuming also the facts stated in the question prior to that, that the Company was proposing under those circumstances to put out \$500,000, additional 5 per cent bonds certified on the basis of expenditures previously made what would you say as to the salability under the facts stated in both these questions, of these additional \$500,000 of bonds? A. There are too many things left out of the question for me to be able to answer intelligently. The question of the purchase of bonds involves a large amount of investigation and to enable one to answer a question of that kind they would have to have engineer's reports and all of the facts.

Q. Is it not a fact, under the conditions assumed in the question, that the bonds have been practically unsalable. A.

Will you put into the question the actual amount of earnings of the Company and the amount of outstanding bonds. Q. I don't know that I can state them off-hand. Q.

I will state the question again (Question read). Can you answer that question? A. As a hypothetical question it seems to me you ought to eliminate the Idaho-Oregon statements in any way connected with this. MR.

CUMMINS. Q. If the witness don't know what he could do under those circumstances— MR. MAC-

LANE: Q. Can you answer the question? A. If that was all that I had to go on I don't think I would be interested in the bonds. Q.

Well under the con-

ditions assumed in those questions it would have been difficult, would it not, for any public utilities bonds to have found a market? A. Without any further information, I should say yes. Q. As a matter of fact the effect of competition would have to be somewhat tested before any person would be willing to assume the risks involved? A. Competition don't necessarily make a thing valueless, or even of less value than it was before. Q. Competition, however, is a very important element in the question of salability and price of securities in a utility Company is it not? A. Ordinarily speaking, yes.

The witness further stated that Mr. Smith, to whose firm he belonged, was a member of the Priest Committee and that the bonds sold by that firm had been deposited with that committee.

On Re-Direct Examination the witness stated:

MR. CUMMINS: Q. Assuming, Mr. Ranstead, that a large part of the Company's investment had been made in a power plant which was needed for the conduct of the Company's business, and which was yet uncompleted, and that the proceeds of the Bonds respecting which Judge MacLane has inquired of you hypothetically were to be used to complete that power plant, and that such completion would give the Company an ample supply of power needed in its business, at a low cost of operation, what effect would that have upon the salability of the Bonds the proceeds of which were to be used for such purpose? A. I think it would be of material help.

MR. CUMMINS read the deposition of Charles O. Reynolds taken on behalf of Interveners at Chicago, Illinois on June 14, 1914.

The witness testified that he was in the business of selling bonds in Chicago with the firm of W. G. Souders & Company; that during the year 1908 and in subsequent years he was a member of the firm of Beierlein & Reynolds and had been actively engaged with that firm in the purchase and sale of Idaho-Oregon First and Refunding bonds.

The witness produced a list or schedule showing purchases of Idaho-Oregon Light & Power Company First & Refunding Mortgage Bonds made by the firm of Beierlein & Reynolds, of which he was a member, beginning with August 1st, 1910, and extending to October 31st, 1912, showing in each case the date of the purchase, the amount bought, and the price; also a list or schedule showing sales of the same Bonds beginning with August 1st, 1910, and continuing to October 24th, 1912, showing in each case the date of the sale, the price and the amount or quantity sold. It is stipulated that this schedule may be copied into and made a part of the record and the testimony of this witness as showing the transactions of Beierlein & Reynolds in the said Bonds as therein appears. Schedule referred to and produced by the witness is as follows:

BOUGHT.

1910.

Aug.	1 at	80	25% stock	.....	\$ 5,000
"	1	80	" "	.....	12,000
"	2	80	" "	.....	1,000
"	17	80	" "	.....	2,000
Sept.	1	80	" "	.....	5,000
Oct.	5	80	" "	.....	2,000
"	6	80	" "	.....	3,000
"	15	100	Trade	.....	5,000
"	20	100	"	.....	1,000
Nov.	10	100	"	.....	3,000
"	23	100	"	.....	1,000
"	23	85	25% stock	.....	10,000
"	30	100	Trade	.....	1,000
Dec.	1	85	25% stock	.....	1,000
"	1	85	" "	.....	5,000
"	5	85	" "	.....	1,000
"	14	85	" "	.....	1,000
"	15	85	" "	.....	1,000
"	24	85	" "	.....	10,000

1911.

Jan.	9	97	.....	2,000
"	14	85	25% stock	1,000
"	17	85	" "	2,000
"	28	85	" "	4,000
"	30	85	" "	1,000
"	30	85	" "	6,000
Feb.	20	85	" "	6,000
"	27	85	" "	5,000

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Mar.	16	85	“	“	5,000
“	16	85	“	“	29,000
“	17	85	“	“	11,000
“	17	85	“	“	18,000
“	20	85	“	“	3,000
Apr.	5	90			2,000
“	14	89			2,000
“	22	90			.....	3,000
“	22	89			.....	1,000
“	24	88.50			.....	10,000
May	2	88½			.....	10,000
“	3	90			.....	2,000
“	10	88½			.....	66,000
June	1	91			.....	10,000
Sept.	25	88½			.....	1,000
“	26	89			.....	2,000
“	26	88½			.....	1,000
Oct.	3	90			.....	1,000
“	7	94			.....	5,000
“	13	92½			.....	6,000
“	23	92½			.....	10,000
“	24	95			.....	10,000
Nov.	10	94.50			.....	4,000
“	11	94.50			.....	2,000
“	13	94.50			.....	1,000
“	15	94			.....	2,000
“	22	80½			.....	2,000
“	23	95			.....	1,000
Dec.	4	93			.....	4,000
“	19	96			.....	3,000
“	28	93			.....	7,000

1912.				
Jan.	12	93	.....	3,000
"	23	94	.....	2,000
"	30	100	.....	2,000
Feb.	9	93½	.....	2,000
"	9	93	.....	1,000
"	14	93	.....	10,000
"	24	95	.....	5,000
Mar.	1	95	.....	2,000
"	15	98.50	.....	10,000
"	18	97.50	.....	2,000
"	21	97.50	.....	2,000
"	26	97.50	.....	10,000
"	27	98	.....	8,000
"	27	98	.....	3,000
Apr.	1	104	.....	1,000
"	13	101	.....	2,000
May	3	99	.....	5,000
"	11	99	.....	2,000
"	23	98.50	.....	1,000
June	7	95	.....	5,000
"	24	93	.....	5,000
July	30	94.75	.....	10,000
Sept.	13	94.75	.....	3,000
"	17	99	.....	2,000
Oct.	11	98	.....	3,000
"	25	99	.....	3,000
"	31	90	.....	1,000

SOLD.

1910.			
Aug.	1 at 100	.....	5,000
"	1 100	.....	1,000
"	1 98	.....	1,000
"	1 100	.....	10,000
"	3 95	.....	1,000
"	17 95	.....	2,000
"	31 95	.....	4,000
Sept.	1 100	.....	1,000
Oct.	5 98	.....	2,000
"	6 97	.....	3,000
"	15 100	.....	1,000
"	15 100	.....	1,000
"	20 100	.....	4,000
"	31 95	.....	1,000
Nov.	9 97	.....	1,000
"	23 100	.....	10,000
"	23 100	.....	2,000
Dec.	1 100	.....	1,000
"	1 100	.....	6,000
"	5 100	.....	1,000
"	15 97	.....	1,000
"	15 100	.....	1,000
"	30 97	5,000
1911.			
Jan.	5 97	2,000
"	7 97	2,000
"	10 100	1,000
"	14 96	1,000
"	17 97	2,000
"	28 98	3,000

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	"	30	94	1,000
Feb.		18	97	2,000
	"	17	98	3,000
	"	20	95	3,000
	"	21	98	1,000
	"	27	100	2,000
Mar.		1	94	3,000
	"	15	95	.....	1,000
	"	15	95	.....	2,000
	"	15	97	.....	1,000
	"	17	98	.....	1,000
	"	17	98	.....	2,000
	"	18	100	.....	45,000
	"	18	97	.....	1,000
	"	22	100	.....	1,000
	"	24	98	.....	3,000
	"	26	100	.....	1,000
	"	31	100	.....	3,000
Apr.		1	97	.....	3,000
	"	5	97	.....	1,000
	"	6	100	.....	2,000
	"	8	100	.....	1,000
	"	11	97	.....	1,000
	"	21	100	.....	4,000
	"	26	90	.....	10,000
May		1	98	.....	1,000
	"	3	99	.....	5,000
	"	10	100	.....	4,000
	"	10	97	.....	1,000
	"	19	98	.....	1,000
	"	19	99	.....	1,000

	"	22	90	.....	1,000
	"	23	99	.....	4,000
	"	24	100	.....	2,000
June	16	100	.....	1,000	
	"	19	92.50	.....	1,000
	"	17	95	.....	1,000
July	6	98	.....	3,000	
	"	6	95	.....	1,000
	"	19	99	.....	2,000
	"	20	97	.....	10,000
Aug.	22	98	.....	5,000	
	"	31	98	.....	1,000
Sept.	25	90	.....	1,000	
	"	26	90	.....	3,000
	"	30	90	.....	5,000
Oct.	6	98	.....	2,000	
	"	13	93	.....	6,000
	"	13	99	.....	2,000
	"	13	98	.....	2,000
	"	19	99	.....	1,000
	"	25	94	.....	10,000
Nov.	1	100	.....	2,000	
	"	3	99	.....	1,000
	"	2	98.75	.....	2,000
	"	23	100	.....	1,000
	"	22	98	.....	2,000
	"	22	95	.....	2,000
	"	23	95	.....	2,000
	"	25	100	.....	2,000
Dec.	14	99	.....	1,000	
	"	27	93.50	.....	7,000
	"	29	94	.....	9,000

1912.

Jan.	3	95	.....	1,000
"	3	94	Dealer	5,000
"	4	98.50	.....	1,000
"	10	100	.....	1,000
"	20	94.50	Dealer	10,000
"	24	94.25	.....	1,000
Feb.	13	94	Dealer	3,000
"	14	93.50	Dealer	7,000
"	20	99	.....	2,000
"	26	96	Dealer	5,000
"	28	96	Dealer	2,000
Mar.	5	98	.....	2,000
"	6	100	.....	2,000
"	13	98.50	Dealer	10,000
"	26	97.50	K. & K.	10,000
"	27	98	K. & K.	8,000
Apr.	3	98	K. & K.	3,000
"	10	99	.....	1,000
"	20	99	.....	2,000
"	22	98.50	.....	3,000
"	22	99	.....	1,000
"	30	99	.....	3,000
"	30	99	5,000
May	1	99	4,000
"	2	99	2,000
"	3	99	2,000
"	7	98.50	1,000
"	9	99	2,000
"	10	99	2,000
"	10	98	1,000

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"	10	98.50	1,000
"	13	99	5,000
"	28	100	1,000
June	10	99	2,000
July	1	99	3,000
"	1	99	1,000
"	1	98	1,000
"	16	99	.....	2,000
"	23	100	.....	1,000
"	30	95.50	.....	4,000
Sept.	17	100	.....	2,000
Oct.	24	98	.....	1,000

1910

Bought	\$ 70,000	at \$ 59,650	.....	\$85.21
Sold	65,000	at 64,240	.....	98.83

1911

Bought	\$259,000	at \$229,475	.....	\$88.60
Sold	220,000	at 213,360	.....	97.00

1912

Bought	\$105,000	at \$101,172.56	.....	\$96.36
Sold	126,000	at 122,747.50	.....	97.42

All the transactions shown were in 6 per cent bonds, but based on his experience of twelve years, the witness said it would have been equally feasible to sell five per cent bonds of the same issue and with the same security during the same period by reducing them to the same price basis; that is, a price to establish the same return to the purchaser. In November, 1912, he had one transaction in 5 per cent bonds with the firm of Kissel, Kinnicutt & Com-

pany in which they purchased two 5 per cent bonds at 80 for a joint account between them and Kissel, Kinnicutt & Company. This joint account ran principally from January to September, 1912, and included transactions aggregating approximately \$30,000.

During the period covered by these transactions the witness saw operating reports, statements and circulars issued by the management of the Company and talked with persons active in the management, particularly a Mr. Humphrey, as a representative of Mr. Fuller, and William and Sinclair Mainland, and in his opinion, from experience as a bonds salesman and with these particular bonds, and from the condition of the Company as it appeared from its statements, reports and information, he could have marketed the 5 per cent First Mortgage Bonds of the Company in the fall of 1912, and thinks they could have been sold on the same basis as the 6's, which would be about 82; and from such experience and information he thought there was no reason why the bonds should not have been then marketed. In fact, there would be an advantake to sell 5 per cent bonds, particularly to individuals, as they do not stop to calculate the basis o freturn and in buying a bond below par figure they are saving money and there will ultimately be a gross profit.

On Cross-Examination by MR. MACLANE the witness testified that his dealings in the bonds were based upon reported statements of earnings for 1911 and preceding years which showed a surplus in a

substantial amount over fixed charges and also upon the statement as to the amount of bonds issued, and outstanding under the mortgage and the fact that the Company was operating in non-competitive territory, as well as from his own personal investigation of the property.

In answer to a question as to what the effect upon the sale of those bonds would have been had it been known that a competitor was entering the market of the Power Company, he said "I will admit that a competitive company entering a new field and selling bonds would affect the sale of the previous ones." In the fall of 1912 they knew there was a threat of competition and knew something about the competitor having constructed its transmission lines to the city limits of Boise "But we had no concern for the reason that we were given to understand that the strong interests would purchase any competitor that might come in." The effect of competition would depend largely on who brought out the issue of the old Company's bonds; buyers depended to a large extent upon the house offering the bonds, but the fact of impending competition would influence an independent bond house very materially in their purchases of bonds and cause it to make careful investigation of the status and prospects of the company.

The firm of Beierlein & Reynolds has ceased to exist.

On Re-direct Examination by MR. CUMMINS the witness stated:

He knew, and the public interested in the bonds generally knew, that the New York interests composed of the Chase National Bank, Guaranty Trust Company, Kissel, Kinnicutt & Company, and Winslow-Lanier and Company had bought into the Idaho-Oregon properties and were in control of them, and with respect to the salability of the bonds brought out under their auspices said "Why, it was very easy to sell them as soon as we learned that there was a large syndicate which had gone into the field to take over all of the properties."

MR. CUMMINS then read the deposition of CHARLES L. PARMELEE taken on behalf of Interveners in New York City on June 9, 1914.

The witness stated that he was a banker, being a member of the firm of White & Company at 30 Pine Street, New York; that the firm engaged in the purchase and sale of bonds and other securities, and had bought and sold Idaho-Oregon First and Refunding Bonds during a period from 1910 to the spring of 1913. Prior to 1911 sales were generally made at about par. They traded in \$183,000 bonds between April 14, 1910, and January 1, 1911, at par. Beginning January 1, 1911, they had during 1911 and 1912 the following transactions:

Date of Sale.	No. of Bonds.	Price.
1-13-1911	1	100
1-28	2	100
.....	2	99 ³ / ₄
.....	4	98 ³ / ₄

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Date of Sale		No. of Bonds.	Price.
1-30	3	100
2- 2	1	100
	1	100
2- 6	1	100
2-21	10	97½
6-13	5	100
7-24	.....	6	99¾
8-15	.....	1	100
8-22	.....	1	100
8-25	.....	2	100
9-25	.....	1	99
11-8	.....	1	100
2-14-1912	Private client	8,000	99
3- 8	" "	24,000	97⅝
4-13	" "	2,000	100
5-13	" "	2,000	100½
July 5	Kissel, K. & Co.	10,000	95½
" 11	Private client	2,000	100
" 24	" "	1,000	100
Sep. 13	" "	3,000	100
27	" "	2,000	95½
	" "	1,000	95
Nov. 21	" "	18,000	94
Dec. 17	" "	15,000	100
28	" "	3,000	96
31	" "	4,000	98
31	" "	1,000	100

The sale to Kissel, Kinnicutt & Company was to the firm of that name at No. 14 Wall Street, New York, on July 5, 1912, and was of \$10,000 in bonds

at 95½. Sales to brokers are always at a lower price than to the public.

The transactions listed were all in 6's but the 5 per cent bonds could have been sold on the same income basis. That is, at a price which would have yielded the same return to the purchaser.

"The witness was informed by parties in interest that a syndicate composed of the Chase National Bank, the Guaranty Trust Company, the Bankers Trust Company, the First National Bank, Winslow, Lanier & Company and Kissel, Kinnicutt & Company, had purchased all properties in Southwestern Idaho, including a controlling interest in the Idaho-Oregon."

Considering what was publicly known of the affairs of the Power Company in the latter half of 1912, it was his opinion that the First and Refunding 5 per cent Bonds of the Power Company could have been sold at a fair price during that period.

On Cross-Examination by Mr. Bisbee, appearing for this purpose for the respondents, the witness stated:

His firm turned over \$183,000 of the First and Refunding Bonds during 1910; he had a record of the prices paid for them and the prices at which they were sold but did not have it with him. The list furnished by him began with April; he had purchased these bonds from dealers; that the average price paid during 1910 was about 91, in 1911 it was a little higher, probably 92 or 93, and in 1912 either 93 or

94 and sometimes 95. The last transaction was in November or December, 1912.

There was public notice or knowledge among bond houses that New York interests had purchased Idaho-Oregon securities in 1911. When he purchased in 1910 he got statements of the Company's earnings from the Westinghouse Electric & Manufacturing Company but did not remember what the net earnings were. He did not recall the facts nor did he know of his personal knowledge whether the Company was doing construction work at the Ox Bow in 1910, nor did he know that in making statements of its earnings, the Company did not include in its interest charges amounts payable on bonds issued and the proceeds of which were used in connection with the Ox Bow development, but the only statement of earnings published was of gross earnings, operating expenses and net earnings. There was no statement of bond interest in the statement furnished. They knew approximately the number of bonds outstanding and figured that the net earnings were in excess of bond interest, but did not recall by how much. He would say it was probably between \$50,000 and \$100,000. The bonds were sold on the earnings as reported and what the Company expected to earn on completion of their development. He thought they were worth par at that time. The Company never reported surplus earnings; they only made a statement of net earnings applicable to interest charges. He was advised as to the amount of bonds outstanding at the time and considered inter-

est on all the bonds outstanding. He understood there was a surplus of between \$50,000 and \$100,000 in excess of the amount sufficient to pay interest on all the bonds outstanding. He had acquainted himself to a certain extent with the details of the Company's situation from September to the end of December, 1912, and it was reported to be earning all its interest charges except as to those in excess of the First and Refunding Mortgage bonds. He was not acquainted with the floating indebtedness and had not learned the details since that time. He could not give the earnings of the Company in excess of fixed charges for the period from September to December, 1912, and did not recall whether he had learned as to whether its earnings were in excess of interest charges on all its obligations, nor did he know the aggregate of the consolidated bonds outstanding nor the floating indebtedness. He had not determined the Company's actual condition in the period from September to December, 1912, nor had he determined what would be a fair price for its 5 per cent bonds during that period. His statement as to the salability of the 5 per cent bonds was based upon information which he had received prior to that time.

On Re-direct Examination by MR. CUMMINS the witness stated that in speaking of the bonds outstanding and the interest charges he only referred to the First and Refunding bonds and not to the consolidated or junior bonds, and had no knowledge of the amount of those outstanding or what the interest charges on them were.

On Re-cross Examination by MR. BISBEE he said that his knowledge as to these matters had only been acquired since that time.

MR. CUMMINS then read the deposition of EDWARD J. MULLER taken on behalf of Intervenors in New York City on June 9, 1914. The witness testified that:

He was the Treasurer of Fuchs & Lang Manufacturing Company, 119 West 40th Street, New York. He had been in business in New York for thirty years. He and other members of his firm were owners of First and Refunding bonds of the Power Company and he had personal knowledge of all purchases of such bonds by the members of the firm. The dates of such purchases and the prices were as follows:

May 22, 1911—	\$2,000 at par.
Nov. 1,	— 1,000 at par.
Dec. 22,	— 2,000 at par.
Mar. 26, 1912—	7,000 at par.
June 7,	— 6,000 at par and one.
June 27,	— 5,000 at par and a half.
July 1,	— 5,000 at par.
	— 1,000 at par and a half.
July 11, 1912—	4,000 at par and a half.

All these purchases were made from one dealer in the city of New York and in making them he made inquiries with reference to the market value of the bonds, and the purchases made, especially those in 1912 were made at what he learned to be the market value.

On Cross-Examination by MR. BISBEE the witness stated:

The prices were made by Paul Beardsley & Company who sold the bonds, and from time to time he checked up the prices with other houses with whom he dealt and was informed in all instances that the prices were at the market. The prices were based upon the opinion of other bankers as to the market value at that time. He never went into the details of the Company's earnings or financial condition although Beardsley & Company occasionally sent them extracts of statements of earnings. He did not remember when he received such statements nor what they showed except that in a general way they seemed ample to take care of interest charges, and earned a considerable surplus above such charges, and while he could not remember the amount, he was satisfied it would be in excess of \$25,000 and thinks it must be in excess of \$50,000 or he would not have bought the bonds.

He was a member of the Priest Committee and one of the Intervenor in the cause.

MR. CUMMINS offered in evidence the record of minutes of a special meeting of the Board of Directors of the Power Company, held at the Chase National Bank, New York City, on February 24, 1913, and the same was received and is as follows:

Interveners' Exhibit No. 4.

Minutes of a Special Meeting of the Board of Directors of Idaho-Oregon Light & Power Company,

held at the Chase National Bank, No. 83 Cedar Street, Borough of Manhattan, New York City, on February 24th, 1913, at 3:30 P. M.

Present:

Messrs. Albert H. Wiggin,
S. L. Fuller,
Sinclair Mainland,
R. W. Watson,
Charles H. Sabin,
John D. Ryan.

Absent:

Messrs. William Mainland,
Stacy C. Richmond,
A. E. Thompson,
Ralph N. Burtis,
Grant Fitch.

Mr. R. D. Watson acted as Chairman of the meeting, and Mr. G. E. Hendee, the Secretary of the Company, acted as Secretary thereof.

The Secretary stated that due notice of the meeting had been given by him personally to all the directors of the Company.

Mr. Charles H. Sabin presented his resignation as a director of the Company to take effect at once.

On motion,

RESOLVED, that Mr. Sabin's resignation be and the same hereby is accepted, and that the Board proceed to the election of his successor to serve for Mr. Sabin's unexpired term.

Mr. G. E. Hendee was nominated for election as director of the Company to serve for Mr. Sabin's unexpired term, and there were no further nominations for this office. A ballot was duly taken and all of the directors present, with the exception of Mr. Sinclair Mainland, who voted against said election, voted for the election of Mr. Hendee, and he was thereupon duly declared elected a director of the Company to serve for the said term, and thereupon joined the meeting.

Mr. Albert H. Wiggin presented his resignation as a director of the Company and as a member of the Executive Committee, such resignation to take effect at once.

On motion,

RESOLVED, that Mr. Wiggin's resignation be and the same hereby is accepted, and that the Board proceed to the election of his successor to serve as a director for Mr. Wiggin's unexpired term.

Mr. Judson H. Morey was nominated for election as director of the Company to serve for Mr. Wiggin's unexpired term, and there were no further nominations for this office. A ballot was duly taken and all of the directors present, with the exception of Mr. Sinclair Mainland, who voted against said election, voted for the election of Mr. Morey and he was thereupon duly declared elected a director of the Company to serve for Mr. Wiggin's unexpired term, and thereupon joined the meeting.

Mr. S. L. Fuller presented his resignation as a director of the Company and as a member of the Exec-

utive Committee thereof, such resignation to take effect at once.

On motion,

RESOLVED, that Mr. Fuller's resignation be and the same hereby is accepted, and that the Board proceed to the election of his successor to serve as director for Mr. Fuller's unexpired term.

Mr. Edward J. Wolff was nominated for election as director of the Company to serve for Mr. Fuller's unexpired term, and there were no further nominations for this office. A ballot was duly taken and all of the directors present, with the exception of Mr. Sinclair Mainland who voted against said election, voted for the election of Mr. Wolff, and he was thereupon duly declared elected a director of the Company to serve for Mr. Fuller's unexpired term, and thereupon joined the meeting.

Mr. Stacy C. Richmond presented his resignation as Vice-President of the Company, such resignation to take effect at once.

On motion,

RESOLVED, that Mr. Richmond's resignation as Vice-President of the Company be and the same hereby is accepted, and that the Board proceed to the election of his successor to serve as Vice-President of the Company for Mr. Richmond's unexpired term.

Mr. R. W. Watson was nominated for election as Vice-President of the Company to serve for Mr. Richmond's unexpired term, and there were no

further nominations for this office. A ballot was duly taken and Mr. Watson was unanimously elected Vice-President of the Company to serve for Mr. Richmond's unexpired term.

Mr. Richmond presented his resignation as director of the Company, such resignation to take effect at once.

On motion,

RESOLVED, that Mr. Richmond's resignation as director be and the same hereby is accepted, and that the Board proceed to the election of his successor to serve for Mr. Richmond's unexpired term.

Mr. Milton H. Greenwalt was nominated for election as director of the Company to serve for Mr. Richmond's unexpired term, and there were no further nominations for this office. A ballot was duly taken and all of the directors present, with the exception of Mr. Sinclair Mainland who voted against said election, voted for the election of Mr. Greenwalt, and he was thereupon duly declared elected a director of the Company to serve for Mr. Richmond's unexpired term, and thereupon joined the meeting.

Mr. John D. Ryan presented his resignation as a director of the Company, such resignation to take effect at once.

On motion,

RESOLVED, that Mr. Ryan's resignation be and the same hereby is accepted, and that the Board proceed to the election of his successor to serve for Mr. Ryan's unexpired term.

Mr. John James McGirl was nominated for election as director of the Company to serve for Mr. Ryan's unexpired term, and there were no further nominations for this office. A ballot was duly taken and all of the directors present, with the exception of Mr. Sinclair Mainland who voted against said election, voted for the election of Mr. McGirl, and he was thereupon duly declared elected a director of the Company to serve for Mr. Ryan's unexpired term, and thereupon joined the meeting.

At the close of the meeting Mr. Sinclair Mainland stated that he opposed the election of the new board of directors because he desired it to appear that he did not approve of the resignations of the directors which were tendered and accepted.

On motion,

ADJOURNED.

(Signed) G. E. HENDEE,
Secretary.

In connection with this exhibit MR. CUMMINS read from the deposition of MR. S. L. FULLER in substance as follows:

"Charles H. Sabin, referred to as presenting his resignation, was Vice President of the Guaranty Trust Company; G. E. Hendee, elected as his successor, was Secretary of the Railway Company and an employee of Kissel, Kinnicutt & Company. Mr. Wiggin, who resigned, was President of the Chase National Bank, and Mr. Morey, elected in his place, was an employee of Winslow, Lanier & Company,

bond dealers and bankers, but not a partner of their firm; Mr. Wolfe, who was elected in place of Mr. Fuller, was an employee in the bookkeeping department of Kissel, Kinnicutt & Company. Mr. Richmond, who resigned, was a partner in the firm of Winslow, Lanier & Company; and Mr. Milton H. Greenwalt, his successor, was an auditor in the office of Robert W. Watson, the managing director of the Company, who was elected Vice President in place of Mr. Richmond. Mr. Ryan, who resigned, was President of the Amalgamated Copper Company and director of some banks; and Mr. McGirl, elected in his place, was a man in Winslow, Lanier's office."

MR. CUMMINS further read from the deposition of S. L. Fuller the following as to the execution of the junior or consolidated mortgage:

"All the bonds that could be issued for the Ox Bow had been already certified, and the reason for making the second mortgage on the Company's properties was because they could no longer use the First mortgage bonds and had to go into a second mortgage, which, of course, being a second mortgage, and not showing any interest at all, were absolutely unmarketable except as a very speculative investment."

MR. CUMMINS then offered in evidence the following exhibits consisting of letters showing transactions in Idaho-Oregon Refunding Bonds, which, over objection as irrelevant and immaterial, were

admitted by the Court "only for the purpose of showing that such sales were made," together with the price and by whom sold.

Intervenors' Exhibits 6 to 26, Both Inclusive.

TELEGRAM.

Day Letter.

n31nygw 31 BLUE

New York Jan. 13th.

Beirlein and Reynolds,

First Natl. Bank Bldg., Chicago, Ills.

Please quote by letter today market for Idaho Oregon power stocks and bonds with the size of market both ways we are particularly interested to know of there are any buyers.

KISSEL, KINNICUTT and CO.,

615p

Rec. 8:15 AM

Chicago, Jan. 15, 1912.

Kissel-Kinnicutt & Co.,

37 Wall St.,

New York, N. Y.

Your day letter of thirteenth just received Writing you today.

BEIERLEIN & REYNOLDS.

COR-NC

W. U. 9:20

Charge Beierlein & Reynolds,
1136 First Natl. Bank Bldg.

Kissel, Kinnicutt & Co.,
37 Wall Street,
Cables, "Kiskin" New York.

New York, February 2, 1912.

Chas. O. Reynolds, Esq.,
Messrs. Bierlein & Reynolds,
First National Bank Bldg.,
Chicago, Ill.

My dear Mr. Reynolds:

Yours of the 31st ultimo with reference to the IDAHO OREGON market has been received. I presume that you are working on the sort of a letter that you would like to send out to the bondholders whose names you have and in anticipation of that I will do nothing further.

Yours very truly,
(Signed) FRANK J. HUMPHREY.

FJH|GMB

February 6, 1912.

Mr. Frank Humphrey,
c|O Kissel-Kinnicutt & Co.,
37 Wall St.,
New York, N. Y.

Dear Mr. Humphrey:

We enclose copy of letter which we propose sending to holders of Idaho-Oregon Light & Power Company bonds and believe a letter of this character should be sent at this time giving them some idea of the situation. It is our opinion very few of the holders will dispose of their bonds and with your co-operation believe that a firm market at 98 to 100

can be made without it being necessary to purchase many of the bonds.

You will recollect in our conversation that I suggested that the financial papers be given a statement of the facts and if statements can be given along the lines of our letter it will confirm our statements and would carry considerable weight. We can tend to this if you agree with the suggestion.

Also, we would be very much pleased to have you read our letter carefully and make any correction which in your opinion should be made.

We are,

Very sincerely yours,

BEIERLEIN & REYNOLDS.

By

COR-NC

Encls.

Kissel, Kinnicutt & Co.,

37 Wall Street,

Cables, "Kiskin" New York.

New York, February 7, 1912.

C. O. Reynolds, Esq.,

Messrs. Beierlein & Reynolds,

First National Bank Bldg.,

Chicago, Ill.

Dear Mr. Reynolds:

I beg to acknowledge receipt of your favor of the 6th instant enclosing a copy of a letter which you propose sending to holders of IDAHO-OREGON Bonds. The letter is all right excepting that I think

you might say at the beginning of the second paragraph "sometime ago a strong syndicate was organized" and instead of saying in the same paragraph "and now controls all of the water power properties" say "and now controls the principle water power properties."

I am writing today to Mr. Clinton B. Evans, owner and editor of the Chicago "Economist" with reference to this business. I am saying to Mr. Evans that I would appreciate his making some mention of what is going on in these properties and have told him that you will call and furnish him with details. Please let me know the result of your visit and also please let me know what results you get from your letters.

Yours very truly,

(Signed) FRANK J. HUMPHREY.

FJH|GMB

February 9, 1912.

Mr. Frank Humphrey,
c/o Kissel-Kinnicutt & Co.,
27 Wall St.,
New York, N. Y.

Dear Mr. Humphrey:

We have your letter of the 7th and have today mailed to our list of Idaho-Oregon bondholders the enclosed letter, and thank you for your suggestion as to changes.

We have not seen Mr. Clinton B. Evans of the "Economist" but will tomorrow and will write you the result of our interview.

We will be glad to have you let us know what you want us to do in reference to the bonds.

We are,

Very sincerely yours,

BEIERLEIN & REYNOLDS.

By

COR-Nc

“In 1911 and 1912 Bierlein & Reynolds, bond dealers of Chicago, were engaged in buying and selling Idaho-Oregon First & Refunding Mortgage Bonds upon joint account with Kissel, Kinnicutt & Company. The following is a circular letter prepared and sent out by them in connection with these transactions, and the copy introduced in evidence contains a memorandum thereon reading ‘O. K. by K. K. & Co.’ K. K. & Co. meaning the firm of Kissel, Kinnicutt & Company.”

BEIERLEIN & REYNOLDS

Investment Bonds

Municipal, drainage and corporation

Telephone Randolph 623

1136 First National Bank Bldg.

CHICAGO.

February 9, 1912.

IDAHO-OREGON LIGHT & POWER COMPANY

You will find attached statement showing the earnings of the Idaho-Oregon Light & Power Company for the Month of November, 1911, compared with the same month of 1910, also a comparison of

the earnings for the first eleven months of 1911 with the same period of 1910, and we call your attention to the increase.

Sometime ago a strong syndicate was organized in New York for the purpose of purchasing and consolidating all of the hydro-electric and traction properties in Southwestern Idaho, including the Idaho-Oregon Light & Power Company. To-date this syndicate has expended over \$3,000,000 and now controls the principal water power properties and traction lines in this section. At the present time the demand for power is considerably in excess of the supply and work is being pushed for the development of additional power. The company owns two interurban lines, the Boise & Interurban and the Boise Valley Electric lines, which will be factors in the consumption of power to be developed.

William and Sinclair Mainland, officers of the Idaho-Oregon Light & Power Company, are officers in the new company, William Mainland being President.

The consolidation of these properties assures the production of power at a minimum cost and insures a steady market for the output.

We again repeat, as we have before stated, that the Idaho-Oregon Light & Power Company bonds are an excellent investment and one on which we believe you will realize a material profit. We refer you to any New York bank to confirm our statements that the syndicate is composed of strong

financial institutions capable of handling any proposition which it may undertake.

We are,

Very sincerely yours,

BEIERLEIN & REYNOLDS.

Dictated

NC

OK by K. K. & Co.

2-7-12

March 5, 1912.

Mr. Frank Humphrey,
c/o Kissel-Kinnicutt & Co.,
27 Wall St.,
New York, N. Y.

Dear Mr. Humphrey:

Referring to our telephone conversation, we confirm to you that we have today purchased \$2,000 Idaho-Oregon Light & Power Company bonds at 97 and accrued interest. These bonds will be carried on our books in account with you which we are to share jointly.

As I understand the situation we are to keep in touch with the market buying and selling these bonds from time to time after conferring with and receiving instructions from you, settlement to be made when we have closed out all trades in this account. Our advantage in this arrangement is the fact that we will have your buying and selling orders and it will not be necessary for us to rely upon our own judgment as to the market. We are in a position

to carry \$20,000 or \$30,000 bonds at any one time but for a larger amount than this will have to look to you for financial assistance.

We feel that we are entitled to some credit for the present market on these bonds, which has been worked up from 93.50. The larger the volume of business we do in this joint account arrangement naturally the larger the profit will be and trust that we will be permitted to trade quite freely in these securities. About two weeks ago when we offered to purchase and sell bonds it was a very short time before we became recognized as a market and received a number of inquiries. Tomorrow we will bid 97 for the bonds and will wire you for instructions as to selling.

With kindest personal regards, we are,

Very sincerely yours,

BEIERLEIN & REYNOLDS.

By

COR-NC

Kissel, Kinnicutt & Co.,

37 Wall Street,

Cables, "Kiskin" New York.

New York, March 12, 1912.

C. O. Reynolds, Esq.,

Messrs. Beierlein & Reynolds,

Chicago, Ill.

My dear Mr. Reynolds:

I beg to acknowledge receipt of your two favors, one of the 8th and one of the 9th and have noted their contents. Am sending you herewith a statement of

the number of bonds outstanding on the IDAHO-OREGON COMPANY and total interest charges from which you will see that they have a substantial margin over and above the interest charges in the earnings. As I understand it no dividends on the preferred stock was paid last year;

I hope that you are endeavoring to put some bonds out around the present prices as we think it is just as well to sell on the way up as to wait until you get the bonds to par and then begin to sell.

Yours very truly,
(Signed) FRANK J. HUMPHREY.

FJH|GMB
Enclosure.

Kissel, Kinnicutt & Co.,
37 Wall Street,
Cables, "Kiskin" New York.

New York Mar. 13th, 1912.

Messrs. Beierlein & Reynolds,
First National Bank Building,
Chicago, Ill.

Dear Sirs:

We have purchased for our Joint Account \$10,000 Idaho-Oregon Light & Power Co 1st & Ref. 6% bonds at 98 and interest and confirm your sale of these bonds for the Joint Account at 98½ and interest, which bonds we will ship to you tomorrow by the 20th Century Limited, and would thank you to remit as per enclosed statement by telegraph upon receipt of the bonds. We understand you have pur-

chased for the account \$2000 bonds and would thank you to advise us the price paid and the maturities of the same.

We remain,

Yours very truly,
KISSEL, KINNICUTT & CO.

Enclosure
PMH

KISSEL, KINNICUTT & CO.

Bankers

37 Wall Street.

New York, March 13, 1912.

Mess. Beirlein & Reynolds,

First National Bank Building, Chicago, Ill.

Dear Sir:

We confirm sale to you for acct.

Amount	Security	Price	Amount
3 m Idaho Oregon Light &			
	Power 1st Ref 6s ..1920	98½	Int. 2955
2 m " " "	..1922	98½	Int. 1970
5 m " " "	..1924	98½	Int. 4925
	Int. 5 mons 14 days		27333
			<hr/>
			\$10123.33

All transactions payable

in New York funds

Yours very truly,
KISSEL, KINNICUTT & CO.

Per D.

Kissel, Kinnicutt & Co.,
37 Wall Street,
Cables, "Kiskin" New York.

New York, March 15th, 1912.

Messrs. Beierlein & Reynolds,
Chicago.

Dear Sirs:

We are in receipt of your letter of the 13th instant addressed to our Mr. Humphrey who is not at the office today, and have taken due note of the contents.

With regard to the Idaho-Oregon Light & Power Company First & Refunding 6% Bonds, we fully approve of your proposal and authorize you to maintain a bid price of 98 and to make purchases at this price for the joint account.

Yours faithfully,

(Signed) KISSEL, KINNICUTT & CO.

HR|D

March 20, 1912.

Mr. Frank Humphrey,
c/o Kissel-Kinnicutt & Co.,
37 Wall St.,
New York, N. Y.

Dear Mr. Humphrey:

We have your letter of the 18th. We cannot account for the inactivity of Idaho-Oregon bonds for the past few days. There have been no inquiries come to us. We considered it wise not to appear too anxious to sell bonds. It is generally known that we are purchasing bonds at 98 and although we have

not been offering Idaho-Oregon bonds to our clients it is our intention to do so now that a customer can make inquiry and find that the bonds have a selling value. We intend to punch up the market here and get things stirred up.

We are,

Very sincerely yours,

BEIERLEIN & REYNOLDS,

By

COR-NC

Kissel, Kinnicutt & Co.,

37 Wall Street,

Cables "Kiskin" New York.

New York, March 18, 1912.

C. O. Reynolds, Esq.,

Messrs. Beierlein & Reynolds,

Chicago, Ill.

My dear Mr. Reynolds:

I beg to acknowledge receipt of your favor of the 15th instant and have noted all that you have to say with reference to the \$10,000 IDAHO-OREGON Bonds that you sold as well as the \$2,000 bonds that you are carrying in the Joint Account. We are very anxious to keep this account active and shall be greatly obliged if you will keep this market stirred up.

Yours faithfully,

(Signed) FRANK J. HUMPHREY.

FJH|GMB

Your salesmen are offering the bonds aren't they?

368 *State Bank of Chicago, Trustee, vs.*

Kissel, Kinnicutt & Co.,
37 Wall Street,
Cables "Kiskin" New York.

New York, March 25, 1912.

C. O. Reynolds, Esq.,
Messrs. Beierlein & Reynolds,
Chicago, Ill.

My dear Mr. Reynolds:

Yours of the 20th and 21st with reference to IDAHO-OREGON BONDS is received and would have had my attention earlier but for the fact that I have been absent from the City for the past four days. You are handling this business in the right way and I am sure that you will be able to get the market up a little higher which is what we want. I do not know anything about the certificates of common stock and would suggest that you write Mr. Mainland direct.

Yours faithfully,

(Signed) FRANK J. HUMPHREY.

FJH|GMB

Kissel, Kinnicutt & Co.,
37 Wall Street,
Cables "Kiskin" New York.

New York, Mar. 26th, 1912.

Messrs. Beirlein & Reynolds,
First National Bank Building,
Chicago, Ill.

Dear Sirs:

We beg to confirm, that you have purchased for the Joint Account \$10,000 Idaho-Oregon Light &

Power 1st & Ref. 6% bonds at 97½ and interest and \$11,000 bonds at 98 and interest, and also our instructions to deliver the same against payment to Messrs. King, Farnum & Co., as advised over our private wire with Messrs. King, Farnum & Co. We will carry these bonds for the Joint Account.

Yours very truly,

(Signed) KISSEL, KINNICUTT & CO.

PMH.

Kissel, Kinnicutt & Co.,

37 Wall Street,

Cables "Kiskin" New York.

New York, April 18, 1912.

C. O. Reynolds, Esq.,

Messrs. Beierlein & Reynolds,

Chicago, Ill.

My dear Mr. Reynolds:

I beg to acknowledge receipt of your letter of the 16th with reference to the market situation in the IDAHO-OREGON Bonds. I do not wish to crowd you but if you can begin to work a few of these off and get a little activity in that market it will suit us very much.

With kind regards,

Yours faithfully,

(Signed) FRANK J. HUMPHREY.

FJH|GMB

370 *State Bank of Chicago, Trustee, vs.*

Kissel, Kinnicutt & Co.,
14 Wall Street,
Cables "Kiskin" New York.

New York, May 2nd, 1912.

Messrs. Beierlein & Reynolds,
1136 First National Bank Building,
Chicago, Ill.

Dear Sirs:

We are in receipt of yours of April 30th. and note that you have sold \$2,000 Idaho-Oregon Light & Power 6% bonds due 1930 at 99 and interest for the Joint Account. We note that these bonds were previously purchased at 97 and which you carried. Will you kindly advise us whether you wish to keep the profits on this account until it is terminated or whether you will send us a check for the profits on this transaction. It is better for one of us to keep the profits so as to avoid complications when the Account is closed.

Yours very truly,
(Signed) KISSEL, KINNICUTT & CO.

UDC

May 4, 1912.

Mr. Frank Humphrey,
c/o Kissel-Kinnicutt & Co.,
New York, N. Y.

Dear Mr. Humphrey:

We have your letter of May 2nd referring to the \$2,000 Idaho-Oregon bonds which we sold at 99 and purchased at 97 for the joint account, we will retain the profits earned in this account until we have dis-

posed of all of the bonds that have been purchased. According to our records there are \$21,000 of 6s and \$3,000 of 5s to be sold. Indications are that we will have them disposed of within a short time.

Yours sincerely,
BEIERLEIN & REYNOLDS.

By

OOR-NC

Kissel, Kinnicutt & Co.

14 Wall Street,

Cables "Kiskin" New York.

New York, June 4, 1912.

Messrs. Beierlein & Reynolds,

First National Bank Bldg.,

Chicago, Ill.

Dear Sirs:

Referring to your inquiry for information as to the earnings of the Idaho-Oregon Light, Heat & Power Co., we beg to advise that for the quarter ending March 31st, 1912, the Company reports gross operating revenue of \$95,733.57, which is an increase of 11.2% over the corresponding period of the year ending March 31, 1911. After allowing for operating expenses, interest, taxes, etc., the Company reports a surplus of \$37,420.67.

The conditions prevailing in the territory served by this Company are favorable and we confidently expect a continuance of these satisfactory results.

Yours very truly,

(Signed) KISSEL, KINNICUTT & CO.

FJH-GMB.

372 *State Bank of Chicago, Trustee, vs.*

Kissel, Kinnicutt & Co.

14 Wall Street.

New York, August 23, 1914.

Messrs. Beierlein & Reynolds,

First National Bank Bldg.,

Chicago, Ill.

Dear Sirs:

Our Chicago office has requested us to send you statement of earnings of the IDAHO OREGON LIGHT & POWER COMPANY which we are pleased to do.

The Company reports gross earnings for the X half year ending June 30, 1912, of \$196,178.19, an increase of 17.3% over the corresponding period of the year 1911. The amount available for fixed charges, \$119,942.20; fixed charges, excluding interest on the bonds issued against the Ox Bow plant now under construction, amount to \$47,726.25; the rental of the Barber plant \$4,999.98, leaving a surplus after these charges, excluding the above interest on the Ox Bow development of \$67,215.97. An analysis of the gross earnings shows that there has been a large gain in Commercial Power earnings of which about one-half is derived from irrigation pumping. We would say that the present conditions in the Company are satisfactory and we hope for a continuance of this good showing.

We hope that this fills your inquiry, and beg to remain

Yours very truly,

KISSEL, KINNICUTT & CO.

MR. CUMMINS then offered in evidence receipts from the Power Company to the State Bank of Chicago acknowledging the receipt of bonds, which such receipts were received, and are as follows:

Interveners' Exhibit No. 37.

December 11th, 1912.

RECEIVED of the State Bank of Chicago, as Trustee, bonds Nos. 3342 to 3691, both inclusive, of the Idaho-Oregon Light & Power Company, duly certified by the said State Bank of Chicago, as Trustee, being three hundred fifty (350) bonds for One Thousand (\$1,000.00) Dollars each, aggregating Three Hundred Fifty Thousand (\$350,000.00) Dollars. All of said bonds are dated April 1st, 1907, secured by trust deed to the State Bank of Chicago, as Trustee, of like date, and have April 1st, 1913 and subsequent interest coupons attached.

Said bonds were delivered to the undersigned on account of the application for Four Hundred Fifty-five Thousand (\$455,000.00) Dollars in bonds expressed by resolution of the Board of Directors of the Idaho-Oregon Light & Power Company at a meeting held September 25th, 1912, with various affidavits, opinion of counsel, etc., accompanying the same, all in accordance with the provisions of the trust deed securing said bonds.

IDAHO-OREGON LIGHT & POWER COMPANY.

By G. E. Hendee,
Treasurer.

Intervenors' Exhibit No. 38.

January 29th, 1913.

RECEIVED of the STATE BANK OF CHICAGO, as Trustee, bonds Nos. 3692 to 3754, both inclusive, of the Idaho-Oregon Light & Power Company, duly certified by the State Bank of Chicago, as Trustee, being sixty-three (63) bonds for One Thousand (\$1,000.00) Dollars each, aggregating Sixty-three Thousand (\$63,000.00) Dollars. All of said bonds are dated April 1st, 1907, secured by trust deed to the State Bank of Chicago, as Trustee, of like date, having April 1st, 1913 and subsequent interest coupons attached.

Said bonds were delivered to the undersigned on account of the application for Four Hundred Fifty-five Thousand (\$455,000.00) in bonds expressed by resolution of the Board of Directors of the Idaho-Oregon Light & Power Company passed at a meeting held September 25th, 1912, with various affidavits, opinion of counsel, etc., accompanying the same, all in accordance with the provisions of the trust deed securing said bonds.

IDAHO-OREGON LIGHT & POWER COMPANY.

By G. E. Hendee,

Treasurer.

It was stipulated between counsel that the Railway Company still holds the 718 bonds in question, subject to its mortgage; That is, they were deposited by the Secretary, Mr. Hendee, with the Guaranty Trust Company, Trustee, under the Railway Company's general mortgage, which held the consoli-

dated bonds as collateral trust security, in lieu of such consolidated bonds which were taken down, the one security being substituted for the other under the said mortgage.

The following, being a request upon the Trustee to foreclose the mortgage to the plaintiff, State Bank of Chicago, was offered in evidence, to which offer the respondents, by their counsel, duly objected on the ground that the same was incompetent, irrelevant, and immaterial, not germane to the issues on trial, and referred to matters transpiring long subsequent to any of such issues, which objection was by the Court over-ruled, and which ruling the respondents by their counsel duly excepted, and which exception was by the Court allowed.

The instrument was thereupon received in evidence and is as follows:

Intervenors' Exhibit No. 39.

To STATE BANK OF CHICAGO, as Trustee under and by virtue of a mortgage and deed of trust from IDAHO-OREGON LIGHT & POWER COMPANY, a Maine corporation, to said STATE BANK OF CHICAGO, as Trustee, dated April 1, 1907.

WHEREAS, the said IDAHO OREGON LIGHT & POWER COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of Maine and transacting business in the States of Idaho and Oregon in compliance with the laws of such states, executed a certain mortgage and deed of trust to the STATE BANK OF CHICAGO,

a corporation duly organized and existing under and by virtue of the laws of the State of Illinois and doing business in the City of Chicago in said state, as Trustee, to secure an issue of its First and Refunding Five and Six Per Cent. Gold Bonds not to exceed in the aggregate the principal sum of \$7,000,000. and there have now been issued and are outstanding under and secured by said mortgage and deed of trust said First and Refunding Five and Six Per Cent. Gold Bonds of said IDAHO-OREGON LIGHT & POWER COMPANY to an aggregate principal amount of \$3,212,000. Sold and \$107,000, pledged by the Company.

You are hereby notified:

1. That we, the undersigned, as a Committee for the holders of said First and Refunding Gold Bonds and other securities of said IDAHO-OREGON LIGHT & POWER COMPANY under and by virtue of a certain agreement of deposit, dated May 1st, 1913, a copy of which agreement is hereto attached and made a part hereof and an original executed copy of which agreement is deposited with said STATE BANK OF CHICAGO as depositary, are the owners and holders of over \$2,221,000. being more than two-thirds, of said First and Refunding Gold Bonds of said IDAHO-OREGON LIGHT & POWER COMPANY outstanding, which bonds are certain of the bonds described in and secured by said mortgage and deed of trust and that the undersigned, Committee, under the terms and provisions of said deposit agreement, is empowered to execute

any demand upon or request to the Trustee under said mortgage and deed of trust, and to cause said mortgage to be foreclosed.

2. That default has been made by said IDAHO-OREGON LIGHT & POWER COMPANY in the payment of the interest due and payable on April 1, 1913, upon all its issued and outstanding First and Refunding Gold Bonds issued under and secured by said mortgage and deed of trust as aforesaid and that said default in the payment of interest so due and payable has continued thence unremedied and that said default has continued unremedied for a period of three months after presentation and demand for payment of certain interest coupons of said bonds due and payable on April 1, 1913.

NOW, THEREFORE, by reason of the aforesaid default the undersigned as such Committee and as the holders and owners of more than two-thirds of the said First and Refunding Bonds now outstanding under and secured by said mortgage and deed of trust declare the amount of the principal of all of the bonds now outstanding under and secured by said mortgage and deed of trust, together with all of the accrued and unpaid interest thereon to be immediately due and payable, and hereby request and direct you, STATE BANK OF CHICAGO, as Trustee under said mortgage and deed of trust, forthwith to declare the whole of the principal and interest of said bonds outstanding under and secured by said mortgage and deed of trust at once due and payable and to proceed to foreclose the lien of said mortgage

and deed of trust upon all of the real estate and personal property and all other property of said IDAHO-OREGON LIGHT & POWER COMPANY, including its hydro-electric, power and distributing systems, in any court or courts of competent jurisdiction, and take such other steps as you may be advised by your counsel are necessary and proper.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this second day of July, 1913.

SAMUEL L. FULLER, (SEAL)

CHARLES E. BOCKUS, (SEAL)

..... (SEAL)

WM. MAINLAND. (SEAL)

..... (SEAL)

Majority of Committee of the First and Refunding Bonds and other securities of IDAHO-OREGON LIGHT & POWER COMPANY under agreement dated May 1, 1913, and as such Committee the owners of more than two-thirds of all of said First and Refunding Bonds described in and secured by said trust deed and now outstanding.

The following were stipulated to be facts:

1. That the total amount of first mortgage bonds in the treasury of the Idaho-Oregon Light & Power Company on September 25, 1912, plus certifications subsequent to September 25, 1912, and prior to April 1, 1913, was \$718,000, all being five per cent bonds.

2. That the total amount of Idaho-Oregon bonds certified subsequent to April 1, 1913, was \$107,000, five per cent bonds.

3. That the total amount of bonds outstanding certified under the mortgage to the State Bank, the complainant herein, prior to September 25, 1912, was \$2,494,000.

4. That the Idaho-Oregon Company began shortly after its organization the construction of the so-called Ox Bow plant, at the Ox Bow bend of the Snake River, on the border of Idaho and Oregon, and up to May, 1910, the company had expended, according to its records, approximately \$2,000,000 upon the construction of said Ox Bow plant and the transmission line to connect the same with the company's distributing system. That the company then had legal advice that further issues under the mortgage of the State Bank of Chicago, complainant herein, could not be used for completing the Ox Bow. On September 19, 1911, this plant remained uncompleted, no part of it being in operation, and no power being produced thereat.

5. The annual interest on the underlying divisional bonds of the Idaho-Oregon Company during the years 1911 and 1912 was approximately \$31,000, and the interest on the first and refunding mortgage bonds secured by the mortgage to the complainant herein, of the same years, was approximately \$150,000 per annum, and that the total requirements during those years for interest on the underlying divisional and first mortgage bonds outstanding was approximately \$181,000 for each year.

6. The new company referred to in the contract of September 19, 1911, was organized as therein

contemplated, and is the Idaho Railway, Light & Power Company, another respondent herein, hereinafter, for convenience, called the Railway Company. It was organized about November, 1911, and became the owner of the Swan Falls Power plant, the distributing systems at Nampa and Caldwell, the Boise & Interurban Railway, the Boise Valley Railway, and the transmission lines connecting the Swan Falls plant with the other parts of the property.

7. The stock of the Idaho-Oregon Light & Power Company agreed by the contract of September 19, 1911, to be transferred to Kissel, Kinnicutt & Company was so transferred to them, or upon their order, and was afterwards transferred to the Idaho Railway, Light & Power Company, in exchange for equivalent amounts of its stock. Other stockholders of the Idaho-Oregon Light & Power Company, including the Mainlands and their representatives on the boards of directors, also exchanged their stock for equivalent amounts of the stock of the Railway Company, and on September 25, 1912, the Railway Company held more than eighty per cent of the entire authorized capital stock of the Idaho-Oregon Light & Power Company, the total authorized issue being one hundred thousand shares.

It was further stipulated that interest due on the first mortgage bonds, secured by mortgage to the State Bank of Chicago, due October 1, 1912, was paid. That the interest due on consolidated bonds then issued and outstanding on November 1st, 1912, was paid. That no other interest was subsequently

paid on either of these issues. That default was made in the payment of interest on the first mortgage bonds secured by the mortgage to the State Bank, due April 1, 1913. That the bill to foreclose herein was filed on July 7, 1913.

That on December 23, 1913, a bill was filed by a creditor against the Idaho Railway Light & Power Company alleging its insolvency in this Court, and that a Receiver was appointed under such bill, and that the Railway Company filed an answer admitting its insolvency.

It was thereupon in substance stipulated in a colloquy between Court and counsel that, for the purpose of this case, the properties of the Power Company should be deemed of less value than the aggregate of the first mortgage bonds; that is, that they would not bring the amount of such bonds on foreclosure sale.

Mr. Cummins then offered in evidence a portion of Article 20 of the Deed of Trust from the Power Company to the State Bank of Chicago, securing the first and refunding bonds which had been foreclosed, and reading as follows:

“The Company shall have the right or option (and such right or option is hereby expressly reserved and conceded to it) to purchase, redeem, pay off and cancel any and all of the bonds hereby secured on April 1st, 1915, or on any day subsequent thereto on which an interest installment thereon shall become due and payable until and including October 1st, 1926, by

payment of all interest then accrued and unpaid thereon and payment therefor at the rate of 105 per centum of their par value; and on April 1, 1927, or on any day subsequent thereto on which an interest installment thereon shall become due and payable until and including October 1st, 1936, by payment of all interest then accrued and unpaid thereon and payment therefor at the rate of 102½ per centum of their par value; and on April 1st, 1937, or on any day subsequent thereto on which an interest installment thereon shall become due and payable by payment of all interest then accrued and unpaid thereon and payment therefor at their par value, provided, however, that at least sixty (60) days notice of the Company's intention to exercise such right or option shall have been given as herein, and in the said bonds, provided."

The foregoing was all testimony offered by the Intervenor on the issue of the 718 bonds.

Additional testimony was offered by Intervenor and by respondent, State Bank of Chicago, on the validity of the certification of the 107 bonds involved in the issues as framed by the Court's order, showing in effect that such bonds were requisitioned by the Power Company from the State Bank of Chicago, Trustee, in January, 1913, but by reason of investigations made by the Trustee were not certified until on or about April 7, 1913, and then upon demand of the Power Company, and were receipted for by the Secretary and Treasurer of the Power Com-

pany on or about April 10, 1913. The Court having sustained the certification of such bonds and resolved this issue in favor of respondents, such testimony is not included herein.

Here the Intervenors rested.

Testimony was then offered on behalf of respondents by Mr. MacLane as follows:

The respondents offer, as Exhibit A, certain provisions of the mortgage from the Idaho-Oregon Light & Power Company to the State Bank of Chicago, being the mortgage which has been foreclosed by decree in this cause, as follows:

“THIS INDENTURE, Made as of the 1st day of April, 1907, by and between the IDAHO-OREGON LIGHT & POWER COMPANY (hereinafter referred to and called the “Company”), a corporation duly organized and existing under and by virtue of the laws of the State of Maine, having its principal office in the city of Portland, Cumberland County, and State of Maine, party of the first part, and the STATE BANK OF CHICAGO, as Trustee (hereinafter referred to as and called the “Trustee”), a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, doing business in the city of Chicago, County of Cook, and State of Illinois, party of the second part, WITNESSETH:”

Then you can state, Mr. Reporter, that here follow recitals and a form of bond, in which form of bond the following clause appears:

“This bond is one of a series of seven thousand (7,000) bonds numbered from one (1) to seven thousand (7,000) both inclusive, of like form, tenor and effect (except as to date of maturity and rate of interest, those bearing numbers from one (1) to two thousand five hundred (2,500) bearing six per cent. (6%) interest, and those from two thousand five hundred and one (2,501) to seven thousand (7,000) five per cent. (5%) interest), said bonds amounting in the aggregate to seven million dollars (\$7,000,000), the payment of all of which bonds, with interest as aforesaid, is equally and ratably, and without preference of one bond over another, secured by a trust deed or mortgage duly executed and delivered to the said State Bank of Chicago, Illinois, as Trustee, conveying to it all the property now owned or hereafter to be acquired by the Idaho-Oregon Light and Power Company, to which trust deed or mortgage reference is hereby made for a description of the property and franchises mortgaged, the nature and extent of the security, the rights of the holders of the bonds under the same, and the terms and conditions upon which the bonds are issued and secured, which trust deed is made part hereof.”

Later in the bond follows the clause:

“The holder of this bond shall have no recourse for the payment thereof or of any coupons issued therewith or of the indebtedness thereby evidenced, to any individual liability of any incorporator or any past, present or future stockholder, officer or director of the undersigned, imposed by any statute

or otherwise or for or on account of anything or act heretofore or hereby done or omitted, all such liability being taken to be waived by such holder at the time of the purchase hereof, and by accepting this bond each successive holder assents to the terms of this provision.

“This bond shall not become obligatory until it shall have been authenticated by the certificate of the said State Bank of Chicago, as Trustee endorsed hereon.”

Then follow forms of signature and form of coupons, and trustee’s certificate, the trustee’s certificate being as follows:

“This is to certify that this is one of a series of bonds numbered from one (1) to seven thousand (7,000) both inclusive, described in the trust deed within mentioned.

“STATE BANK OF CHICAGO, TRUSTEE,

By
Secretary.”

Then follows:

“NOW, THEREFORE, this indenture witnesseth, that the said Company in consideration of the premises and of One Dollar (\$1.00) to it in hand paid by said Trustee, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of the said bonds and every part thereof as the same shall become due and payable according to the tenor of all of said bonds and the said coupons, has granted and by these presents does grant, bargain, sell, convey, assign, con-

firm, transfer and mortgage unto the said party of the second part as Trustee, and unto its successor or successors in trust forever."

Here follows a description of the property mortgaged, and, after the description, the following clause:

"IN TRUST, HOWEVER, for the equal and proportionate benefit and security of all present and future holders of the bonds and coupons issued and to be issued under and secured by this indenture, and for the enforcement of the payment of said bonds and coupons, when payable, and the performance of and compliance with the covenants and conditions of this indenture, without preference, priority or distinction, as to lien or otherwise, of any one bond over any other bond by reason of priority in the issue or negotiation thereof, so that each and every bond issued and to be issued as aforesaid shall have the same right, lien and privilege under this indenture, and so that the principal and interest of every such bond shall, subject to the terms hereof, be equally and proportionately secured hereby, as if all had been made, executed, delivered and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of this indenture shall take effect from the day of the date hereof, without regard to the date of actual issue, sale or disposition of said bonds, and as though upon the day of such date all of said bonds had been actually issued, sold and delivered to, and were in the hands of innocent holders for value."

After the foregoing follows Article One of the covenants of the mortgage, and then follows Article Two of the Covenants, as follows:

“ARTICLE TWO. The bonds hereby secured shall not become obligatory until they shall have been authenticated by the certificate of the Trustee endorsed thereon. All of said bonds shall be executed by said Company and delivered at one time to said Trustee, which shall forthwith certify those bearing numbers from one (1) to five hundred (500) both inclusive, being each of the denomination of one thousand dollars (\$1,000.00) and amounting in all to five hundred thousand dollars (\$500,000.00) and shall deliver the same to or upon the order of the president of the Company; the bonds bearing number two thousand five hundred and one (2501) to three thousand and fifty (3050) both inclusive, being each of the denomination of one thousand dollars (\$1,000.00) and amounting in all to five hundred and fifty thousand dollars (\$550,000.00) shall be set apart by the Trustee and held for the purpose of paying off and retiring the present outstanding bonds, heretofore issued by the Electric Power Company, Limited, a corporation organized under the laws of the state of Idaho, doing business at Boise, in said State, amounting to forty thousand dollars and interest; and the present outstanding bonds of the Boise-Payette River Electric Power Company, a corporation organized under the laws of West Virginia, doing business in the state of Idaho, amounting to five hundred thousand dollars (\$500,000.00)

and interest; and said five hundred and fifty thousand dollars (\$550,000.00) of bonds shall be certified and delivered, by the Trustee, to the Treasurer of the Company, from time to time, upon the written order of the President of the Company upon the application of the Company expressed by resolution of its Board of Directors and an affidavit of the President of the Company or some other executive officer of the Company to the effect that bonds of the said Electric Power Company, Limited, or bonds of the Boise-Payette River Electric Power Company have been paid and cancelled, which principal, interest, premium and discount, if any, together with the actual costs and expenses of getting in and paying off of the same amount to the par value of such of the bonds hereby secured and so set apart as are at that time demanded and required by the Company; whenever pursuant to a resolution of the Board of Directors of the Company the Trustee shall be requested so to do, it shall deliver any of the said bonds so set apart in exchange for bonds of either the Electric Power Company, Limited, or for bonds of the Boise-Payette River Electric Power Company, dollar for dollar of their par value and thereupon at the request of the Company cause such bonds by it received in exchange to be cancelled by the proper Trustee or Trustees.

“Of the remainder of said bonds, those bearing numbers from five hundred and one (501) to two thousand five hundred (2500) both inclusive, amounting in the aggregate to two million dollars

(\$2,000,000.00) shall be certified and delivered to said Company by said Trustee from time to time for the following purposes, that is to say: To provide the means for building and constructing a dam in the Snake River at the Oxbow Bend on premises hereinbefore particularly described with the necessary gate house, tunnels, canals, races, and waste-weirs, and a suitable and sufficient power house to where produce and provide for hydraulic power to an amount not less than twenty thousand horse power and for a first installation of water-wheels, electric machines and machinery to make one-half of said amount of power, or ten thousand horse power, presently available for sale and distribution, and for the building and providing a transmission line from the power house at the Dam to the City of Boise, Idaho, said two million dollars (\$2,000,000.00) of said bonds par value or so much thereof as may be necessary and required for such purpose to be certified and delivered to the treasurer of the Company from time to time as the work progresses and in the proportion that the work then done and material then purchased bears to the said two million dollars (\$2,000,000.00) of said bonds. Said bonds, however, shall not be certified or delivered except upon the application of the Company expressed by resolution of its Board of Directors stating the purposes for which the same are required, accompanied by an affidavit of the president of the Company or some other executive officer thereof and by an affidavit of the engineer of the Company showing the amount and

value of the work then done and material purchased for such installation and improvements and to the effect that the amount of bonds then demanded does not exceed a sum equal to the proportion that the said amount bears to the said two million dollars (\$2,000,000.00) of said bonds.

“The remainder of said bonds being bonds bearing numbers from three thousand and fifty-one (3051) to seven thousand (7000) both inclusive, being each of the denomination of one thousand dollars (\$1,000) and aggregating in amount the sum of three million nine hundred and fifty thousand dollars (\$3,950,000) shall be held by said Trustee until certified and delivered to said Company by said Trustee from time to time for the following purposes, to-wit:

“1. To provide means for the purchase or acquisition of other properties or plants of a kindred character, such as water powers, water works, gas and electric plants, electric roads, urban or interurban, or interests therein or stock in corporations owning and operating the same and such as may be desired by the Company for its use in connection with its business or deemed necessary or convenient in extending the demand for its produced power or current; for such purposes bonds shall be certified and delivered to the Company, upon the request of the Board of Directors thereof addressed to the Trustee stating the property purchased giving a description of the same, the actual value thereof, and the consideration paid or to be paid, which consideration shall include nothing by way of expenses or com-

missions on account of such purchase, each request to be certified under the seal of the said Corporation and accompanied by a sworn statement of the engineer or other similar officer or agent of the Company, that he has carefully examined the property so purchased, and what is the true money value thereof according to his best information and belief, and an affidavit of the president of the Company that in his judgment the purchase thereof is, on the part of the Company, desirable, and that the same is required by the Company in the extension of its business and that for such purposes the price paid is fair and just, and that such price does not include any sum or sums on account of commissions or expenses incurred in the purchase thereof; the amount of bonds demanded by the Company and certified and delivered to it by the Trustee pursuant hereto shall in no case exceed the true value of the property purchased as thus shown and determined.

“2. In case the Company shall purchase or acquire other properties or plants as in the preceding subdivision number 1, is mentioned, or the stock of any corporation owning and operating the same, which properties, plants or stock the Company shall have determined to be desired or necessary or convenient in extending the demand for its produced power or current, and such properties or plants or the properties or plants of any such corporation whose stock is so desired, deemed necessary and purchased or acquired shall be incumbered by mortgage or trust deed of and upon such properties or plants

given as security for the payment of outstanding bonds or other evidences of indebtedness, then and in that case for the purpose of providing for the paying off of the same and at the request of the Company an equal amount of bonds hereby secured shall be set apart by the Trustee and held for the purpose of paying off and retiring such outstanding bonds or indebtedness so secured by mortgage or trust deed upon such properties or plants or any of them to an amount equal to such outstanding bonds or evidences of indebtedness and for the purpose of paying off and retiring such outstanding bonds or indebtedness, so secured by mortgage or trust deed upon any such properties or plants, bonds shall be certified and delivered to the Company upon the request of the Board of Directors thereof and an affidavit of the president of the Company or some other executive officer of the Company to the effect that bonds of such character have been paid and cancelled, which principal, interest, premium and discount, if any, amount to the par value of such of the bonds hereby secured as are at that time demanded and required by the Company, and whenever pursuant to a resolution of the board of directors of the Company the Trustee shall be requested so to do, it shall deliver any bonds so set apart in exchange for bonds of such other corporation or so a lien upon property of this corporation so purchased or acquired, dollar for dollar, of their par value, and thereupon, at the request of the Company, cause such bonds by it received in exchange to be cancelled by the proper trustee or trustees.

“3. For ninety per cent of such amounts as may be after this date actually expended by the said Company in additions, improvements, extensions, enlargements, equipments, or betterments to any of its plants or property now or hereafter acquired.

“In no case under this provision shall said bonds be certified and delivered except upon the request of the Board of Directors of said Company expressed by resolution thereof addressed to the said Trustee, stating the purposes of the expenditures and that the same has been actually made; to be accompanied also, where the expenditure is for work done or material purchased by said company, by a sworn statement of the engineer or similar officer or agent of the Company that the work has been done and material purchased and the cost thereof, and where the expenditure is for real estate, the presentation to the Trustee of the deed conveying the same to said Company with an opinion of counsel to the Company showing the title thereto in said Company free from all incumbrances.

“Should it happen that any of the bonds hereby authorized to be certified and delivered for other expressed uses and purposes be not required or actually used for the purposes so expressly mentioned in reference thereto, then and in that case the same may be certified and delivered to the Company for the purposes stated in and in the manner provided by the two preceding sub-divisions marked respectively 1 and 2.

“In any case herein provided for the presentation of such applications in manner and form as respectively set forth and designated shall be full and complete authority and protection to the Trustee to certify and deliver bonds pursuant thereto and no duty or obligation is imposed upon the Trustee to look behind such application in certifying and delivering bonds in accordance therewith.

“The Trustee shall not be in any wise responsible or answerable for the issuance or negotiation of any of the bonds which may be certified by it or delivered in accordance with the provisions of this deed of trust.

“Upon request of the holder of any bond secured hereby and the production of such bond to the Trustee, the same may be registered on the book or books of the Trustee kept for that purpose, which registration of said bond on the books of said Trustee shall show the number of said bond, the amount thereof and the name of the registered holder thereof, together with his proper postoffice address and at the time of such original registration and at the time of every registration of any subsequent transfer thereof the Trustee shall endorse on said bond a certificate of such registration, and after registration of ownership duly endorsed thereon, no transfer, except on the books of said Trustee, shall be valid unless the last registration thereof shall have been to bearer. All coupons, however, shall at all times remain and be payable to bearer.”

Then follows Article Three, which need not be incorporated in the record.

Then follows Article Four, which provides that: "Unless there shall be some continuing default in respect of any of the matters mentioned in Article Twenty-four of this indenture, the Company, from time to time, shall be entitled to receive and to collect all dividends that may be declared on any shares of the capital stock of other corporations that shall have become subject to this indenture," etc.

Then Article Eight, which reads as follows:

"Until default shall be made in the payment of the principal or interest of the said bonds, or some of them, or any of them, or in the maintenance of insurance or in the payment of taxes or assessments as herein provided, or until default shall be made in respect to some thing by these presents required to be done by said party of the first part, the said Company shall be suffered and permitted to possess, manage, develop, operate and enjoy the property herein conveyed and intended so to be, and to take and use the income, rents, issues and profits thereof in the same manner, except as provided herein, to the same extent and with the same effect as if this deed had not been made."

Then Article Thirty-eight:

"And no holder of any bond or coupon hereby secured shall have any right to institute any suit, action or proceeding in equity or at law for the foreclosure of this indenture, or for the execution of any

trust thereof, or for the appointment of a receiver or for any other remedy hereunder; it being understood and intended that no one or more holders of bonds and coupons hereby secured shall have any right in any manner whatever to affect, disturb or prejudice the lien of this indenture by his or their action, or to enforce any right hereunder, and that all proceedings at law or in equity shall be instituted, had and maintained by the Trustee in the manner herein provided and for the equal benefit of all holders of such bonds and coupons."

Article Forty-two:

"For the debt and bonds secured hereby the Company is liable in persona and any deficiency after exhausting the hereby mortgaged and pledged security may be enforced against the Company and its property and assets, but not against its corporators, officers, directors or stockholders individually. And it is expressly agreed between the parties hereto and by every person who shall take or hold any bond or bonds issued hereunder or any coupon or coupons thereto, that the past, present and all future corporators, officers, directors and stockholders of the Company shall not be individually liable to any extent or for any purpose with respect to such bonds, or the coupons thereon, or any of them, or for any thing or act done or omitted and any such liability by statute or otherwise is expressly waived."

It was stipulated:

The requisitions by the Company to the Trustee for the bonds which are included within the 718

bonds now held and claimed by Idaho Railway Light & Power Company and its receiver were for the following numbered bonds which were received by the Company and were made between the dates, and to fund expenditures made by the Idaho-Oregon Light & Power Company shortly preceding those dates, for the purposes stated.

1. Bonds 2501 to 2540 to reimburse the Company for expenditures made in retiring the underlying divisional bonds on the properties formerly belonging to the Electric Power Company, Limited, but at the time of such expenditure and now belonging to the Idaho-Oregon Light & Power Company, and covered by the mortgage to the plaintiff, State Bank of Chicago. Of said bonds the Railway Company holds numbers 2501 to 2514, inclusive, and 2525 to 2534 inclusive, aggregating \$24,000.00, and representing the number of Electric Power Company bonds actually retired, the remaining sixteen of said bonds not having been retired, and the sixteen bonds requisitioned for such retirement not having been used, and not being within the bonds held or claimed by the Railway Company in this case. These bonds were requisitioned and received by the Company during the month of April, 1909.

2. Bonds numbered 3051 to 3288, inclusive, requisitioned and received by the Company between April 1, 1908, and August 20, 1910, to reimburse the Company for 90 per cent of such amounts as had actually been expended by the Company since, to-wit, January 1, 1908, in extensions, enlargements, equip-

ments or betterments to its plants and property, as provided in paragraph 3 of Article 2 of the mortgage.

3. Bonds No. 3289 to 3341 requisitioned and received by the Company between September 1, 1909, and November 1, 1910, to reimburse the Company for expenditures made in the purchase by it during said period or prior thereto, and subsequent to January 1, 1908, of (a) The Emmett lighting plant and distributing system, (b) The Payette lighting plant and distributing system, (c) The Interstate Lighting plant at Ontario, Oregon, all of said plants then and now belonging to said company.

4. Bonds No. 3342 to 3754 requisitioned September 25, 1912, and received by the Company during December, 1912, and January, 1913, to reimburse the company for ninety per cent of expenditures made under said Clause 3 of Article 2 of the mortgage for ninety per cent of such amounts as had been expended between July 1, 1910, and July 31, 1912, in additions, improvements, extensions, etc., to the Company's plants and properties.

5. The 107 bonds were requisitioned on or about January 10, 1913, for extensions, improvements and betterments of the same general nature as the preceding requisition made between August 1, 1912, and November 30, 1912, said bonds being requisitioned on or shortly after January 10, 1913, and received by the Company on April 10, 1913.

Mr. MacLane then offered in evidence as respondents' Exhibit B a copy of minutes of the meeting of

the Executive Committee of the Power Company held at Chase National Bank December 27, 1912, which were received, over objection by interveners that the minutes were not signed by anyone as Secretary, nor proved as minutes of the meeting, under the following stipulation signed by all counsel in the case.

“It is hereby stipulated by and between solicitors for the respective parties herein that either of the parties hereto may, upon the hearing of any of the issues involved herein, offer in evidence any of the following record books of the defendant Idaho-Oregon Light & Power Company. Minutes of Board of Directors. Minutes of Stockholders. Minutes of Executive Committee. That upon said offer no proof of identification of said books shall be necessary, further than the statement of solicitor for said defendant, Idaho-Oregon Light & Power Company that the books so offered are the record books of said defendant Company and have been received by him from the Secretary of said Company, G. E. Hendee, and are now in the custody of said solicitor, as Assistant Secretary of said Company, which said statement, together with the statement of fact that the books have not been altered while in his custody, the said solicitor may be required to verify by affidavit or oath at the request of any of the parties.”

And the further statement by Mr. MacLane.

“I will state that those are the minutes contained in the books which I received by express from G. E. Hendee; that they were not altered while in my custody, and that I kept them in my custody until a re-

ceiver was appointed in this cause and I was directed to turn them over to the receiver."

Also the testimony of G. E. Hendee appearing in the deposition hereinbefore shown as follows: "Q. You may identify these minutes of the Executive Committee." "A. Minutes of a special meeting of the Executive Committee of the Idaho-Oregon Light and Power Company held at the Chase National Bank, No. 83 Cedar Street, Borough of Manhattan, New York City, on Friday, December 27, 1912, at 4 P. M." "Q. Those are the official minutes of that meeting, are they?" "A. Yes, these are the official minutes," and the admission of Mr. Cummins of the identity of the minutes offered with those identified by Mr. Hendee.

The same was admitted by the Court subject to the point as to whether or not an unsigned entry in an official record book of a corporation was admissible. Said exhibit was as follows:

Respondents' Exhibit B.

MINUTES of a special meeting of the Executive Committee of IDAHO-OREGON LIGHT & POWER COMPANY held at the Chase National bank, No. 83 Cedar Street, Borough of Manhattan, New York City, on Friday, December 27th, 1912, at 4 p. m.

Present:

Messrs. Albert H. Wiggin
R. W. Watson
S. L. Fuller
Sinclair Mainland
William Mainland.

Mr. William Mainland acted as Chairman of the meeting and Mr. Sinclair Mainland as secretary thereof.

The chairman stated that he had settled the Bates & Rogers Construction controversy and presented to the meeting copies of all the agreements and other papers executed by him in the name of this Company and in its behalf, pursuant to such settlement, which were as follows:

Chicago, Illinois,
November 29, 1912.

To Bates & Rogers Construction Company,
885 Old Colony Bldg., Chicago.

Gentlemen:

We make you the following proposition of compromise settlement of the contractual relation now existing between you and the undersigned:

(1) We will pay you Forty Thousand Dollars (\$40,000) in cash.

(2) The undersigned will execute and deliver to you its promissory note for Thirty thousand dollars (\$30,000) to bear date as of the acceptance of this offer and to mature in twelve (12) months thereafter and bear interest at six (6) per centum per annum and to bear the endorsements of Messrs. William and Sinclair Mainland.

(3) We will transfer to you by good title, under proper instruments of conveyance, the personal property (belonging to the undersigned and located at Ox Bow Workings) which is sometimes known as the White Plant and being all the property described

in the joint inventory made by Messrs. Sanger and Ruegnitz, a copy of which is attached hereto, except that portion of the property named in the said inventory which is listed as owned by Bates & Rogers Construction Company.

(4) The undersigned will, as a further consideration, deliver to you twenty-five (25) bonds for One Thousand Dollars (\$1000.) each of the undersigned out of its Consolidated First and Refunding Mortgage bonds, secured by mortgage or deed of trust executed by the undersigned to Windsor Trust Company of New York and Marmaduke Tilden as Trustee, dated November 1, 1910, with the coupons thereto annexed maturing May 1, 1913 and thereafter and as a part of the settlement hereunder, we will deliver to you the written undertaking and guarantee of the Idaho Railway Light and Power Company and it will, at your option, purchase said bonds or any part thereof at any time after eighteen (18) months, at the price of Eight hundred dollars (\$800.) per bond all unmatured interest coupons to be attached and, we to pay you any interest earned and unpaid at the date of the repurchase, but if the option is not exercised within sixty days (60) thereafter the said Idaho Railway Light & Power Company shall be released from any further obligation to purchase said bonds.

(5) We will also deliver to you, or to your nominee or nominees, one hundred (100) shares of the full paid common stock of the Idaho Railway Light & Power Company and fifty (50) shares of its full paid preferred stock.

(6) We also agree to assist you in assembling and loading your plant at the Ox Bow Workings to the extent of the services of fifteen (15) laborers, each working day for two (2) weeks, without charge to you.

(7) We will also purchase from you your Ice Plant at the Ox Bow Workings and we will pay you therefor on request at the value of said property as fixed in the appraisement lately made by Messrs. Sanger & Ruegnitz, but we are to have the right at our election to purchase the whole or any part of the articles belonging to you and now comprised in the plant at the Ox Bow Workings known as the Bates & Rogers' plant at the value thereof as fixed by said late appraisement by Messrs. Sanger & Ruegnitz, payment to be made in cash. We are also to have the option to purchase for cash the whole or any part of the articles comprised in the plant known as the White Plant, at a price to be determined by a representative of the undersigned and a representative of your company, and in the event of a disagreement between the two so chosen, they to select a third appraiser, whose determination shall then be conclusive upon the parties hereto, but it is understood that for the purpose of appraisement the value of the entire White Plant shall be taken to be Twelve Thousand Dollars (\$12,000).

It is agreed that our election under the above provision to purchase the plants and articles above mentioned, where an option is reserved to us, shall be exercised within 14 days from the date thereof.

Your acceptance hereof in writing shall constitute a contract between us and if you do so accept, we will make the cash payments and deliveries of bonds and stocks above mentioned to you at your office in Chicago on or before December 15, 1912 and upon our failure so to do, you shall at your election, have the right to cancel the agreement created by this offer and your acceptance of it.

It is to be understood and agreed that you are for the considerations above named, to transfer and deliver to the undersigned, all your supplies and materials for construction on hand at said Ox Bow Workings, which material and supplies shall be free from all liens of any kind at date of settlement hereunder and that the payments and deliveries to you hereunder shall constitute full settlement between us for all claims and demands of all kinds, growing out of our now existing contractual relations and you will execute a formal release if desired.

Yours etc.

(Signed)

IDAHO-OREGON LIGHT & POWER CO.

By William Mainland,

Its President.

Chicago, November 29, 1912.

We hereby accept the above offer of compromise settlement under the terms and conditions therein named.

(Signed)

BATES & ROGERS CONSTRUCTION CO.

By W. A. Rogers,

Its President.

THIS INSTRUMENT made this 16th day of December A. D., 1912 by and between Bates & Rogers Construction Company, a corporation under the laws of Illinois, party of the first part, and Idaho-Oregon Light & Power Company, a corporation under the laws of Maine, party of the second part;

WITNESSETH:

WHEREAS the parties to this instrument under date of November 30, 1909 entered into a certain contract whereby the party of the first part hereto was among other things, to complete the construction and installation of a certain Hydro-Electric plant at or near the Ox Bow bend of the Snake River in Oregon and Idaho; and

WHEREAS certain controversies arose between the parties hereto with respect to said contract and the construction work thereunder; and thereafter under date of November 29, 1912 the parties hereto entered into a certain contract for, and concerning the settlement of said controversies, and

WHEREAS the parties hereto have in part performed said settlement contract of November 29, 1912, and are each satisfied that the other will complete its undertakings under said settlement contract;

THEREFORE in consideration of the promises and of one dollar by each party hereto to the other in hand paid, the receipt whereof is hereby acknowledged, it is arranged, contracted and agreed between the parties hereto as follows:

First: That the said construction contract of

November 30, 1909, be and it is hereby cancelled and annulled.

Second: Each party hereto hereby releases the other, its successors and assigns from all claims and demands for damages in any manner growing out of said contract of November 30, 1909.

Third: The party of the first part hereto also releases and discharges William Mainland and Sinclair Mainland (doing business under the firm name of Wm. and S. Mainland), from and from all liability under their guarantee to Bates & Rogers Construction Company of the performance of said contract by the party of the second part hereto; and in like manner the party of the second part hereto hereby releases and discharges W. A. Rogers and W. W. Christie from and from all liability under their guarantee of the performance by said Bates & Rogers Construction Company of said contract of November 30, 1909.

IN WITNESS WHEREOF the parties hereto have hereunto caused their corporate names and seals to be set by their respective authorized officers, the day and year first above written.

BATES & ROGERS CONSTRUCTION CO.

By W. A. Rogers,
Its President.

Attest:
C. R. BURGHART,
Secretary.

IDAHO-OREGON LIGHT & POWER CO.,
By William Mainland,
Its President.

Attest:
G. E. HENDREE, Secretary.

MEMORANDUM OF AGREEMENT made December 16th, 1912, between IDAHO-OREGON LIGHT & POWER COMPANY, a Maine corporation, party of the first part and William and Sinclair Mainland doing business under the firm name of Wm. and S. Mainland, parties of the second part;

The parties of the second part hereby acknowledge to have received this day from the party of the first part sixty thousand dollars (\$60,000) face value of the party of the first part's First and Refunding Mortgage Five per cent Bonds, issued under and secured by a mortgage and deed of trust made by the party of the first part to State Bank of Chicago and dated April 1st, 1907, said bonds having the serial numbers from 3342 to 3401 inclusive, have been delivered to the parties of the second part as security against the liability incurred by the parties of the second part as endorsers upon a certain note made by the party of the first part to the order of Bates & Rogers Construction Company for Thirty Thousand Dollars (\$30,000) due November 29th, 1913. Should said note not be paid at maturity and should the parties of the second part be called upon to pay as endorsers and actually pay the whole or any part of the principal of the said note, or the interest thereon, the parties of the second part shall have the right to sell said bonds at public or private sale, but on proper notice to the party of the first part and to reimburse themselves from the proceeds of such sale for any sums paid by them as aforesaid, paying over the surplus thereof, less the necessary and reason-

able expenses of the said sale to the party of the first part. Should said note be paid at maturity, together with all interest matured thereon, the parties of the second part shall return said bonds to the party of the first part.

IN WITNESS WHEREOF the parties hereto have caused these presents to be executed by their duly authorized officers.

IDAHO-OREGON LIGHT & POWER COMPANY,
By William Mainland,
President.

Attest:

G. E. HENDEE,
Secretary.

(Corp. Seal) WM. & S. MAINLAND,
By Wm. Mainland,
A Member of the Firm.

After consideration of the chairman's statement, on motion duly made and seconded, it was unanimously

RESOLVED that Mr. William Mainland's action in effecting said settlement with said Bates & Rogers Construction Company upon the terms hereinbefore set forth, and his execution of said note and agreements, be and the same hereby is in all respects confirmed, ratified and approved.

Mr. William Mainland further stated to the meeting that he had agreed in the name of this Company and in its behalf to make with Idaho Railway Light & Power Company, the following agreement:

AGREEMENT Made this 27th day of December, 1912, between IDAHO-OREGON LIGHT & POWER COMPANY a Maine corporation, herein termed the "Power Company" of the first part and IDAHO RAILWAY LIGHT AND POWER COMPANY also a Maine corporation, herein termed the "Railway Company" of the second part;

WHEREAS a controversy existed between the Power Company and Bates & Rogers Construction Company, an Illinois corporation, herein termed the "Construction Company" respecting an agreement between said companies for the construction of a Hydro-Electric Power Plant at Ox Bow Bend on the Snake River in the State of Idaho for the Power Company; and

WHEREAS a settlement of said controversy has been agreed upon which provides, among other things, that the Power Company procure and deliver to the Construction Company fifty (50) shares of the preferred stock and one hundred (100) shares of the common stock of the Railway Company together with the obligation of the Railway Company to purchase from the Construction Company at any time between May 29th and July 29th, 1914, \$25,000.00 face value of the Power Company's Consolidated First and Refunding Mortgage Six Per Cent Gold Bonds at eighty per cent of the face value thereof and interest accrued and unpaid thereon; and

WHEREAS the Power Company has requested the Railway Company to issue and deliver to the Construction Company said stock and obligate itself to

the Construction Company for the purchase of said bonds upon the terms aforesaid; and

WHEREAS the Railway Company has consented to deliver said stock and execute said agreement all upon the terms and conditions hereinafter expressed, which are acceptable to the Power Company;

NOW THEREFORE in consideration of the premises and the mutual covenants hereinafter expressed, it is agreed by the parties hereto, as follows:

First: Upon demand of the Power Company the Railway Company shall deliver to the Construction Company fifty (50) shares of its preferred stock and one hundred (100) shares of its common stock made out as the Construction Company may request and shall execute and exchange with the Construction Company the agreement appearing as "Exhibit A" hereto.

Second: The Power Company shall, upon demand of the Railway Company deliver to the Railway Company such amount, not to exceed \$500,000.00 face value of the Power Company's First and Refunding Mortgage Five Per Cent Gold Bonds secured by the mortgage and deed of trust made by the Power Company to State Bank of Chicago and dated April 1st, 1907 (said amount of said bonds to be in excess of the amount of said bonds exchangeable under the terms of the agreement between the parties hereto made September 25th, 1912), as the Railway Company may from time to time demand, upon receiving in exchange from the Railway Company an amount of the Power Company's Consolidated First and Re-

funding Mortgage Six Per Cent Gold Bonds secured by the mortgage and deed of trust made by the Power Company to Windsor Trust Company of New York and Marmaduke Tilden, as Trustees, dated November 1st, 1910, now owned, or which may hereafter be acquired by the Railway Company; provided, however, that there are or may be made available to the Power Company, a sufficient amount of its said First and Refunding Five Per Cent Gold Bonds to satisfy such demand.

IN WITNESS WHEREOF the parties hereto have caused these presents to be executed in their corporate name by their respective presidents thereunto duly authorized and their respective corporate seals to be hereto attached and attested by their respective secretaries, all as of the day and year first above written.

IDAHO-OREGON LIGHT & POWER COMPANY,

By.....
President.

Attest:

.....
Secretary.

IDAHO RAILWAY LIGHT & POWER COMPANY,

By.....
President.

Attest:

.....
Secretary.

After consideration of this agreement,

On motion duly made and seconded the following resolution was unanimously adopted:

RESOLVED, that the agreement so presented to the meeting be, and the same hereby is in all respects approved and that the proper officers of this Company be, and they hereby are, authorized and requested to execute this agreement in the name of this company and in its behalf and to exchange the same with Idaho Railway Light & Power Company and to carry out in all respects the terms thereof.

Mr. William Mainland stated that, acting upon the advice of Mr. Blackwell, the local management of this Company at Boise and this Company's general counsel, he had made an agreement in the name of this Company and in its behalf to purchase certain equipment from said Bates & Rogers Construction Company at a cost of approximately \$22,000.00 payable as to \$10,000.00 thereof in cash and as to the balance thereof, in a note of the Company, bearing interest at the rate of six per cent per annum, maturing six months from date and to be secured by this Company's Consolidated six per cent bonds taken at eighty per cent of their face value. The equipment so contracted for, being as follows:

After consideration of Mr. William Mainland's statement,

On motion duly made and seconded, it was unanimously

RESOLVED that Mr. William Mainland's action in agreeing to purchase said equipment in the name of this Company and in its behalf, be, and the same hereby is in all respects confirmed, ratified and approved, and that the proper officers of this Company

be, and they hereby are authorized to make such payments and execute such note and deliver such securities as may be requisite and necessary to fully carry out said agreement in all respects.

MR. MACLANE then offered in evidence Respondent's Exhibits C and D, being certain contracts, dated respectively September 25, 1912, and December 17, 1912, and, in support of them, the testimony of O. G. F. Markhus identifying the signatures thereto of William Mainland and G. E. Hendee, and stated that they were respectively President and Secretary of both Idaho-Oregon Light & Power Company and Idaho Railway Light & Power Company during the whole of the year 1912, and also the seals of the Idaho-Oregon Light & Power Company and the Idaho Railway Light & Power Company, appearing on said documents, and the same were received in evidence as follows:

Respondent's Exhibit C.

AGREEMENT made this 25th day of September, 1912, between KISSEL, KINNICUTT & COMPANY, hereinafter called the "Bankers," parties of the first part, IDAHO-OREGON LIGHT & POWER COMPANY, a Maine corporation, hereinafter called the "Oregon Company," party of the second part, and W. AND S. MAINLAND, a firm transacting business in the City of Oshkosh, Wisconsin, and composed of Messrs. William and Sinclair Mainland, hereinafter called the "Mainlands," parties of the third part.

WHEREAS, under date of September 19, 1911, the parties hereto entered into a contract in writing whereby, among other things, the Bankers obligated themselves to purchase of the Oregon Company one million five hundred thousand dollars (\$1,500,000) face value of the Oregon Company's Consolidated First and Refunding Mortgage Six Per Cent (6%) Gold Bonds at eighty per cent (80%) of the face value thereof, and

WHEREAS, pursuant to the terms of said contract the Bankers have purchased to the present date one million three hundred and twenty-five thousand dollars (\$1,325,000) face value of said bonds, leaving to be purchased the further amount of one hundred and seventy-five thousand dollars (\$175,000) face value thereof, which purchase at the said contract price would net the Oregon Company the sum of one hundred and forty thousand dollars (\$140,000) in cash and no more, and

WHEREAS, the Oregon Company will require during the next six months for its corporate purposes the sum of two hundred and fifty thousand dollars (\$250,000), and

WHEREAS, although the Bankers are ready and willing to purchase at the said contract price said one hundred and seventy-five thousand dollars (\$175,000) face value of said bonds, but are unwilling to purchase any further amount of said bonds, and

WHEREAS, the Bankers have offered to procure for the Oregon Company upon the terms hereinafter

expressed, the said sum of two hundred and fifty thousand dollars (\$250,000) in consideration of the Bankers being released from their obligation to purchase said one hundred and seventy-five thousand dollars (\$175,000) face value of said bonds, and

WHEREAS, said offer has been accepted by the Oregon Company,

NOW, THEREFORE, in consideration of the premises and the mutual covenants hereinafter expressed, it is agreed by the parties hereto as follows:

First: The Bankers agree to procure Idaho Railway, Light and Power Company, a Maine corporation, hereinafter called the Railway Company, to loan to the Oregon Company the sum of two hundred and fifty thousand dollars (\$250,000), or any part thereof, with interest thereon at the rate of six per cent (6%) per annum, of which one hundred thousand dollars (\$100,000) shall be loaned forthwith, and the balance thereof, whenever requested by the Oregon Company (such request, however, to be made within six months of the date hereof and if not made within such period the obligation of the Railway Company to make the balance of the loan not so called for to cease and determine), each loan, when made, to be for a period of six (6) months from the making thereof, with an option to the Oregon Company to renew said loan for the further period of six (6) months at same rate, to be secured by an amount of the Oregon Company's said First and Refunding Mortgage Gold Bonds, bearing interest at the rate of 5% per annum, equal at their face value to twice

the amount of such loan, and to be further secured by a promissory note in form as follows:

“New York.....19

Idaho Oregon Light & Power Company, a Maine corporation, promises to pay to Idaho Railway Light & Power Company, at its office in the City of New York, on.....dollars.....
for value received, with interest thereon at the rate of six (6) per centum per annum, payable onhaving deposited with said Idaho Railway Light & Power Company as collateral security.....face value of Idaho Oregon Light & Power Company's First & Refunding Mortgage Five Per Cent Gold Bonds, secured by the Mortgage and Deed of Trust made by said Company to State Bank of Chicago and dated April 1st, 1907;

With authority to sell such security at any broker's board, or at public or private sale, or otherwise at the option of Idaho Oregon Light & Power Company, on the non-performance of promise, and, upon such sale, Idaho Railway Light & Power Company may purchase the whole or any part of such securities, discharged from any right of redemption, retaining claim against Idaho-Oregon Light & Power Company for any deficiency; any surplus arising from said sale, after paying in full the amount due on this loan, both principal and interest, together with the expenses of the sale in question, to be paid to Idaho Oregon Light & Power Company.

The principal of this note shall become due and payable

(a) Upon default being made in the due and punctual payment of any installment of interest thereon; or

(b) Upon default being made in the due and punctual payment of any installment of interest upon any of the Idaho Oregon Light & Power Company's bonds; or

(c) Upon any Court proceedings being instituted against Idaho Oregon Light & Power Company for the purpose of appointing a receiver or otherwise sequestrating its assets for the benefit of its creditors.

IDAHO OREGON LIGHT & POWER COMPANY,

By.....
President.

(Corporate Seal)
Secretary."

Second: As further consideration moving from the Oregon Company to the Railway Company for the making of this loan, the Oregon Company shall on demand of the Railway Company deliver to the Railway Company, such amount not to exceed \$500,000 face value of its said First and Refunding Five Per Cent Gold Bonds as the Railway Company may from time to time demand, upon receiving in exchange from the Railway Company an equivalent amount of the Oregon Company's Consolidated First and Refunding Mortgage Six Per Cent (6%) Gold Bonds, now owned by the Railway Company, provided, however, that there are or may be made available to the Oregon Company a sufficient amount of

PANY, also a Maine corporation, herein termed the "Railway Company," of the second part:

WHEREAS a controversy existed between the Power Company and Bates & Rogers Construction Company, an Illinois corporation, herein termed the "Construction Company," respecting an agreement between said Companies, for the construction of a hydro-electric power plant at Ox Bow Bend on the Snake River in the State of Idaho for the Power Company; and

WHEREAS a settlement of said controversy has been agreed upon, which provides, among other things, that the Power Company procure and deliver to the Construction Company fifty (50) shares of the preferred stock and one hundred shares (100) of the common stock of the Railway Company, together with the obligation of the Railway Company to purchase from the Construction Company at any time between May 29th and July 29th, 1914, \$25,000 face value of the Power Company's Consolidated First and Refunding Mortgage Six Per Cent Gold Bonds at 80% of the face value thereof and interest accrued and unpaid thereon; and

WHEREAS the Power Company has requested the Railway Company to issue and deliver to the Construction Company said stock and obligate itself to the Construction Company for the purchase of said bonds upon the terms aforesaid; and

WHEREAS the Railway Company has consented to deliver said stock and execute said agreement, all

upon the terms and conditions hereinafter expressed which are acceptable to the Power Company;

NOW, THEREFORE, in consideration of the premises and the mutual covenants hereinafter expressed, it is agreed by the parties hereto as follows:

First: Upon demand of the Power Company the Railway Company shall deliver to the Construction Company fifty (50) shares of its preferred stock, and one hundred (100) shares of its common stock made out as the Construction Company may request, and shall execute and exchange with the Construction Company the agreement appearing as Exhibit "A" hereto.

Second: The Power Company shall upon demand of Railway Company deliver to the Railway Company such amount not to exceed \$500,000 face value of the Power Company's First and Refunding Mortgage Five Per Cent Gold Bonds secured by the mortgage and deed of trust made by the Power Company to State Bank of Chicago, and dated April 1st, 1907 (said amount of said bonds to be in excess of the amount of said bonds exchangeable under the terms of the agreement between the parties hereto made September 25th, 1912), as the Railway Company may from time to time demand upon receiving in exchange from the Railway Company an amount of the Power Company's Consolidated First & Refunding Mortgage Six Per Cent Gold Bonds secured by the mortgage and deed of trust made by the Power Company to Windsor Trust Company of New York and Marmaduke Tilden, as Trustees, dated November

1st, 1910, now owned or which may hereafter be acquired by the Railway Company, provided, however, that there are or may be made available to the Power Company a sufficient amount of its said First and Refunding Five Per Cent Gold Bonds to satisfy such demand.

IN WITNESS WHEREOF the parties hereto have caused these presents to be executed in their corporate name by their respective Presidents thereunto duly authorized, and their respective corporate seals to be hereto attached and attested by their respective Secretaries, all as of the day and year first above written.

IDAHO-OREGON LIGHT & POWER CO.,

(Seal)

By William Mainland,

In the presence of:

President.

G. E. Hendee.

IDAHO RAILWAY LIGHT & POWER CO.,

G. E. Hendee.

By William Mainland,

(Seal)

President.

Mr. MacLane then offered the depositions of G. E. Hendee and Robert W. Watson as read in evidence by Interveners, as hereinbefore set forth.

MR. MACLANE then read the deposition of Forsyth Wickes taken on behalf of the Respondents in New York City on June 9, 1914. The witness testified as follows:

He was a practicing attorney, having been admitted to the bar in 1900. During the year 1912 his

firm were the attorneys for the Railway Company and he personally was connected with the negotiations between the Power Company and Messrs. Bates & Rogers, being associated in the matter with Mr. William Mainland, President of the Railway and Power Companies, with whom he conferred with Messrs. Bates & Rogers. William Mainland originally began the negotiations and conducted them for some time with Mr. Rogers, but later Mr. Hubert Rogers, a New York lawyer, was charged with the negotiations on behalf of the Bates & Rogers Company, and the witness personally communicated with him. Then Mr. William Mainland went to Chicago and saw Mr. Rogers of the Company there, arriving at a tentative agreement of settlement upon which the witness finally closed the arrangements with the attorney in New York, and later on Mr. William Mainland and the witness went to Chicago and closed the transaction with Mr. Rogers of the Construction Company and his counsel there.

The matter was considered at various meetings of the Executive Committee and various proposals for settlement were discussed and some of them objected to, and he thought that the subject was considered at four or five separate Executive Committee meetings, and was to the best of his recollection reported to the Executive Committee after the agreement was reached. In consummating the settlement the Railway Company made a guarantee, receiving in consideration the right to exchange Consolidated for Refunding bonds, which arrangement was discussed

by the witness with Mr. Fuller and Mr. William Mainland, and he believes in the presence of Sinclair Mainland, although he did not remember whether he talked to the latter on the subject or whether Mr. Sinclair Mainland merely listened to the discussion. Mr. William Mainland was frequently in the city in the fall of 1912 and it was his habit when he arrived in New York, to call up the witness and make an appointment and come to his office usually about ten or eleven o'clock and discuss the affairs of the Company, when a date of the meeting for the Executive Committee would be arranged usually for about two or two thirty in the afternoon. Matters affecting the Company were discussed in the period between September and the end of December, 1912. Within a short time after holding the Executive Committee meeting, a copy of the minutes would be sent to each member of the committee with the exception of Mr. Fuller, whose secretary, Mr. Hendee, received the original minutes. Mr. Sinclair Mainland acted as the Secretary of the Executive Committee whenever present at a meeting. If he was not present, those duties were performed by another member of the Committee. The minutes were never signed by any member of the Committee as Secretary unless that member was personally present at the meeting. He had no recollection of Mr. William Mainland or Mr. Sinclair Mainland saying that the minutes of December, 1912, were in any way incorrect and copies of such minutes were sent to both of those gentlemen.

On Cross-Examination by MR. CUMMINS the witness stated he wrote up the minutes of the meeting of December 27, 1912, as well as all meetings of the Executive Committee. All minutes were submitted to the members of the Executive Committee present at the time and received their approval before being signed by Mr. Sinclair Mainland. Mr. Mainland sometimes took notes of the meetings and sometimes other members of the Committee took such notes. He did not remember of anybody but himself keeping notes of the minutes of the meeting on December 27th. In speaking of the general practice of sending out the minutes of the Executive Committee meetings, he had no specific recollection as to the minutes of the meeting of December 27th.

O. G. F. MARKHUS was called as a witness on behalf of Respondents and testified to the general history of the Power and Railway companies, and the physical relations between the two as hereinbefore shown, and continued as follows:

During the period from December 1, 1911, to May 1, 1913, the Messrs. Mainland were not in Boise frequently, but about May 1, 1913, they resumed the management of the properties. When Kissel, Kinnicutt & Company became instrumental in the affairs of the companies a new system of accounting was instituted beginning January 1, 1912, by which the expenses previously charged to "Plant Account" or to "Property," such as the commercial and general expense, including advertising, soliciting, subscriptions, donations, insurance, legal expense, salaries of

general officers and the like, were charged to "Operating Expenses."

The witness then identified respondent's exhibit "F" as a statement of cash requirements of the Power Company, prepared by him about September 1, 1912, for the purpose of showing the cash required for the operation of the Company for the last four months of 1912, which was forwarded by him to Mr. Watson, the managing director of the Company, at New York, shortly after it was prepared and early in September, 1912. The same was offered and received in evidence and is as follows:

RESPONDENTS' EXHIBIT F.

Idaho-Oregon Light & Power Company

ESTIMATED CASH STATEMENT.

For Four Months, September 1 to December 31, 1912.

Estimated Cash Available:

Cash in Local Banks, September 1.....	\$33,890
Cash in New York Banks	14,093
	<hr/>
Net from Operating, 4 months.....	89,400
From Forfeiture Boise Railroad Contract.....	2,425

\$139,808

Total Cash Available

Estimated Cash Requirements:

Construction Material on Order and on Hand:

Distribution System	25,974
Transformers for Underground System.....	6,784
Switching Apparatus, etc., for Changing Meridian	
Line from 22,000 to 44,000 Volts.....	4,644

Huntington Distribution System	250	
Gypsum Transmission Lines	14,799	
Gypsum Substation Sundries	181	
Gypsum Mill Transformers	1,938	
Automatic Switch, Horseshoe Bend	113	
Boise Arc Lamps	201	
Portable Meters	506	55,390
<hr/>		
Completing Work in Progress:		
Gypsum-Gypsum Quarry Line	1,250	
Gypsum-Weiser Transmission Line	4,500	
Gypsum-Mormon Basin Transmission Line.....	7,500	
Gypsum-Huntington Feeder Line	2,250	
Huntington Distribution System	3,300	
Gypsum Substation Building	2,500	
Gypsum Substation Installation & Sundries.....	1,500	
Water Cooling System, etc., Boise Substation.....	500	
Underground Contract	25,000	48,300
<hr/>		

New Work:

Nyssa-Caldwell Transmission Line	54,350	
Transformers & Switching Apparatus at Caldwell.	17,012	
Roswell Feeder Line	5,400	
Ontario-Nyssa Canal Feeder Line	6,300	
Reconstruction of Lines carried on Boise Telephone Poles	7,680	
Moving Poles on Brumback Street, Boise.....	1,630	
Ordinary Extensions, Boise	8,000	
Ordinary Extensions, other points.....	8,500	108,872
Total Construction		<hr/> 212,562
Bates & Rogers Construction Company	3,000	
Wm. & S. Mainland	12,650	15,650
Taxes for 1912	9,600	
Bond Interest Deposits (4 months at \$23,794)	95,176	104,776

For Working Balance	10,000	
Total Cash Requirements		342,988
Estimated Cash Deficit		<u>203,180</u>
(a) Interest on new funds is not included.		

The witness then identified five notes of the Idaho-Oregon Light & Power Company to the Idaho Railway, Light & Power Company, as follows:

Note dated October 4, 1912, for \$100,000, bearing interest at 6 per cent per annum, signed by Idaho-Oregon Light & Power Company by William Mainland, President, and G. E. Hendee, Secretary, bearing the seal of the Company.

Note dated October 31, 1912, by the Power Company to the Railway Company for \$20,000, with interest at 6 per cent per annum, signed Idaho-Oregon Light & Power Company by William Mainland President and G. E. Hendee, Secretary, bearing the seal of the Company.

Note dated December 11, 1912, from the Power Company to the Railway Company for \$60,000, with interest at six per cent per annum, signed Idaho-Oregon Light & Power Company by William Mainland, President, and G. E. Hendee, Secretary, bearing the seal of the Company.

Note dated December 6, 1912, from the Power Company to the Railway Company for \$40,000, with interest at six per cent per annum, signed Idaho-Oregon Light & Power Company by William Mainland, President, and G. E. Hendee, Secretary, and bearing the seal of the Company.

Note dated January 3, 1913, from the Power Company to the Railway Company, for \$30,000, with interest at six per cent per annum, signed Idaho-Oregon Light & Power Company by William Main-

land, President, and G. E. Hendee, Secretary, and bearing the seal of the Company.

All notes payable six months from their respective dates, and all being in his custody as Receiver of the Idaho Railway, Light & Power Company, having been obtained by him from Mr. Hendee, Treasurer and Secretary of the Railway Company. None of the notes nor the interest thereon had been paid, either in whole or in part.

The notes were then offered and received in evidence under the stipulation that the original notes need not be introduced and that copies thereof need not be inserted in the record, the foregoing identification of the notes being deemed for the purposes of the case, equivalent to their surrender as exhibits.

Mr. Markhus continued as follows:

A company known as the Beaver River Power Company obtained a franchise in Boise in February or March, 1912, and built its transmission lines to Boise City. Commencing the first part of July in that year, and continuing for several months, the Company solicited business in Boise City, the principal work being done in July and August. At the time the base rate of the Idaho-Oregon Light & Power Company was 15c per kilowatt hour with a 10% discount for prompt payment. For larger quantities of current the rates were somewhat less, there being a sliding scale depending upon the amount used. The advertised and solicited rates of the Beaver River Power Company during that time

were 9c per kilowatt hour net as a base rate, with proportionately lower rates following the same general curve rates as the Idaho-Oregon Company. This Beaver River Company installed a distributing system in Boise during 1912, and commenced actual service of current in December, 1912, from a power plant owned by that Company.

During the years 1908 to 1912 inclusive the Power Company had no other source of income or revenue from which expenditures could be made in retiring underlying bonds, purchasing properties or making additions, enlargements, etc., to its plants and properties than the earnings and proceeds of second mortgage bonds, where the expenditures were not originally made in the first instance from the proceeds of the first mortgage bonds.

Thereupon MR. MACLANE offered the following records, which were received in evidence:

We offer to read into the record, from the audit of Marwick, Mitchell & Peat, for the year 1910, and prior years, which audit, or excerpts from which were read into the record by counsel for the interveners this morning.

“The operations of the Company during the period of four years under review, after charging off all expenses applicable thereto, including maintenance and renewals, but before making provision in respect to depreciation of the physical properties, the amount of which, however, would be of relatively minor importance during this period, resulted as follows:

1907—Net earnings, less operating expenses.....	\$ 90,459.41
1907—Bond and other interest applicable to operations	49,750.00
1907—Surplus income available for dividends.....	<u>40,709.41</u>
1908—Net earnings, less operating expenses.....	112,977.36
1908—Bond and other interest applicable to operations	63,337.19
1908—Surplus income available for dividends.....	<u>49,640.17</u>
1909—Net earnings, less operating expenses.....	142,048.26
1909—Bond and other interest applicable to operations	67,500.00
1909—Surplus income available for dividends.....	<u>74,548.26</u>
1910—Net earnings, less operating expenses.....	214,515.42
1910—Bond and other interest applicable to operations	75,000.00
1910—Surplus income available for dividends.....	<u>139,515.42</u>

To be read in connection with statement from the balance sheet in the same report as of December 31, 1910, showing the following issued and outstanding bonds:

The refunding bonds secured by the plaintiff's mortgage, \$2,492,000.

Boise-Payette River bonds, \$488,000.

Electric Power Company bonds, \$16,000.

Interstate bonds, \$35,000.

Total, \$3,031,000.

Also the statement of current and approved liabilities, reading as follows:

For the year ending December 31, 1910.

Notes payable, \$175,645.14.

Accounts payable, \$335,129.01.

Consumers' deposits, \$3,691.70.

William and Sinclair Mainland, \$25,871.37.

Preferred stock dividend accrued, \$37,051.17.

Bond interest accrued, \$46,903.33.

Total current and accrued liabilities, \$624,291.72.

And reading and offering in connection with that, from the other side of the sheet, current and working assets:

Notes receivable, \$32,002.

Accounts receivable, \$64,360.34.

Merchandise and supplies, \$43,540.21.

Cash on hand and in banks, \$29,136.91.

Total current and working assets, \$169,039.46.

Also the following:

“Included under the heading of operating plants at Boise and other points is an account of development amounting to \$32,696.52, representing charges for advertising, management, salaries, canvassing, soliciting, etc., to December 31, 1910. Similar expenses aggregating \$23,339.80 were charged to this account during the year 1911 by the company’s officials, but we have treated these charges as operating expenses in this report, as we are of the opinion that the Company had, on December 31, 1910, arrived at a point where such charges could no longer be regarded as capital expenditure.” We offer that.

Reading from the balance sheet of the Idaho-Oregon Light & Power Company, as contained in the audit of Messrs. Marwick, Mitchell & Peat for 1911, it shows with respect to bonds outstanding on December 31, 1911,—

First and refunding bonds, \$2,494,000.00.

Consolidated first and refunding bonds, \$1,313,000.00

Boise-Payette River bonds, \$487,000.00.

Electric Power Company, Limited, bonds, \$16,000.00.

Interstate Light & Water Company, \$35,000.00.

Being a total of \$4,345,000.00.

MR. MACLANE: In connection with the last reading is offered also from page 2 of their report a statement for the year 1911, showing net earnings from operations, \$232,897.85; interest on bonded and floating indebtedness applicable to operations, \$86,365.31; net income, \$146,532.54.

Reading from page 2 of the report of Marwick, Mitchell & Peat for the year ending December 31, 1912. One of the reports from which the intervenors offered certain figures, I desire to read from page 2, with respect to the operations for 1912. The operating revenue is given.

Operating revenue, \$397,043.59.

Operating expenses, \$162,487.56.

Taxes, \$13,650.62.

Bad debts, etc., \$3,038.30.

Total expenses, \$179,176.48.

Net earnings from operations, \$217,867.11.

Non-operating revenues, \$8,166.52.

Addition, \$226,033.73.

Interest and rent of Barber plant, \$285,688.01.

Net profit or loss, the loss being shown in red, \$59,634.28 loss.

In connection with this statement, from the same page:

Results for the year ending December 31, 1912, after providing for interest on bonded and floating indebtedness, but subject to the qualifications made in the preceding paragraph, show a loss of \$59,654.28, as compared with a profit of \$146,532.54 for the year ending December 31, 1911. This unfavorable showing is largely due to the fact that in 1912 there has been deducted the sum of \$133,443.90 in respect of interest on bonds issued in connection with the Ox Bow construction, all interest on these bonds having been previously charged to capital."

ERNEST A. WETMORE testified on behalf of respondents as follows:

He was Auditor for the Idaho Railway, Light & Power Company prior to the appointment of the Receiver and had since been Auditor for the Receiver. He identified respondent's Exhibit "G" as a tabulated statement prepared by him from the books of the Idaho-Oregon Light & Power Company giving the prices received by that Company for its bonds, and the same was admitted in evidence and is as follows:

Respondents' Exhibit G.

SUMMARY OF ALL SALES

IDAHO-OREGON LIGHT & POWER COMPANY.
1ST & REFUNDING BONDS
TO DECEMBER 31, 1912.

Price	Amount.
80	\$1,346,000.
85	1,076,000.
87½.....	7,000.
89	23,000.
90	22,000.
95	5,000.
96	5,000.
100	10,000.
<hr/>	
Total	2,494,000.

SUMMARY OF ALL BONDS SOLD

Price	Amount.
80	\$3,109,000.
85	1,076,000.
87½	7,000.
89	23,000.
90	22,000.
95	5,000.
96	5,000.
100	10,000.
<hr/>	
Total	4,257,000.

BONDS SOLD TO JULY 1, 1910.

Idaho-Oregon Light & Power Co., et al. 439

Date	To Whom Sold	Price	1st & Ref. 5's	Amount 1st & Ref. 6's
1907				
June 3	McDonald, McCoy & Co. ....	.85	\$	\$500,000.
1908				
May 6	Wm. & S. Mainland .....	.80		2,000.
June 20	Wm. & S. Mainland .....	.80		1,000.
July 15	Wm. & S. Mainland .....	.80		5,000.
July 30	Wm. & S. Mainland .....	.80		1,000.
Oct. 10	Wm. & S. Mainland .....	.80		25,000.
Dec. 10	Wm. & S. Mainland .....	.80		30,000.
1909				
Jan. 10	Westinghouse Co. ....	.85		100,000.
Jan. 15	1st Nat'l Bk., Weyawega .....	.96		5,000.
Jan. 18	C. E. Etner .....	.85		10,000.
Jan. 25	Mrs. Susan M. Brady .....	.85		1,000.
Mar. 27	Trowbridge & Niver .....	.80		45,000.

Date	To Whom Sold	Price	Amount	
			1st & Ref. 5's	1st & Ref. 6's
Apr. 3	Wm. & S. Mainland	.85		4,000.
Apr. 3	Trowbridge & Niver	.80		55,000.
Apr. 6	Trowbridge & Niver	.80		35,000.
Apr. 14	Wm. & S. Mainland	.85		41,000.
Apr. 14	Wm. & S. Mainland	.85		4,000.
Apr. 12	C. M. Smith & Co.	.85		45,000.
May 6	Trowbridge & Niver	.80		41,000.
June 2	Trowbridge & Niver	.80		50,000.
June 10	Trowbridge & Niver	.80		15,000.
June 23	Wm. & S. Mainland	.80	5,000.	
June 23	Trowbridge & Niver	.80		10,000.
July 9	Trowbridge & Niver	.80		25,000.
July 12	Trowbridge & Niver	.80		25,000.
July 16	Trowbridge & Niver	.80		50,000.
Aug. 3	Trowbridge & Niver	.80		25,000.
Aug. 10	Trowbridge & Niver	.80		50,000.

Sep. 9	Trowbridge & Niver	.80	25,000.
Sep. 16	Trowbridge & Niver	.80	25,000.
Sep. 22	Trowbridge & Niver	.80	25,000.
Oct. 1	Trowbridge & Niver	.80	25,000
Oct. 13	Trowbridge & Niver	.80	13,000.
Oct. 13	Trowbridge & Niver	.80	12,000.
Oct. 13	Trowbridge & Niver	.80	15,000.
Oct. 13	Trowbridge & Niver	.80	12,000.
Oct. 21	Wm. & S. Mainland	.80	1,000.
Oct. 23	Trowbridge & Niver	.80	3,000.
Nov. 3	Trowbridge & Niver	.80	11,000.
Nov. 3	G. E. Knight	.90	2,000.
Nov. 9	Trowbridge & Niver	.80	20,000.
Nov. 11	Trowbridge & Niver	.80	6,000.
Nov. 16	Trowbridge & Niver	.80	25,000.
Nov. 17	Trowbridge & Niver	.80	12,000.
Nov. 19	Trowbridge & Niver	.80	6,000.
Nov. 26	Trowbridge & Niver	.80	2,000.

Date	To Whom Sold	Price	1st & Ref. 5's	Amount 1st & Ref. 6's
Nov. 30	Trowbridge & Niver .....	.80		15,000.
Nov. 30	Trowbridge & Niver .....	.80		3,000.
Dec. 3	Trowbridge & Niver .....	.80		6,000.
Dec. 4	Trowbridge & Niver .....	.80		1,000.
Dec. 8	Trowbridge & Niver .....	.80		12,000.
Dec. 8	Trowbridge & Niver .....	.80		2,000.
Dec. 11	Trowbridge & Niver .....	.80		25,000.
Dec. 23	Paul T. Brady .....	.85		5,000.
Dec. 27	Trowbridge & Niver .....	.80		11,000.
Dec. 31	Paul T. Brady .....	.85		5,000.
1910				
Jan. 7	Trowbridge & Niver .....	.80		22,000.
Jan. 8	Trowbridge & Niver (McCague) .....	.80		5,000.
Jan. 8	Paul T. Brady .....	.85		10,000.
Jan. 10	Trowbridge & Niver .....	.80		15,000.
Jan. 10	Paul T. Brady .....	.85		5,000.

Jan. 12	Trowbridge & Niver .....	.80	10,000.
Jan. 17	Paul T. Brady .....	.85	2,000.
Jan. 19	Paul T. Brady .....	.85	23,000.
Jan. 20	Trowbridge & Niver .....	.80	12,000.
Jan. 25	Trowbridge & Niver .....	.80	18,000.
Jan. 26	Paul T. Brady .....	.85	2,000.
Jan. 27	Trowbridge & Niver .....	.80	10,000.
Jan. 31	Trowbridge & Niver .....	.80	15,000.
Jan. 31	Westinghouse Co. ....	.70	30,000.
Feb. 1	Trowbridge & Niver .....	.80	3,000.
Feb. 1	Paul T. Brady .....	.85	1,000.
Feb. 1	Paul T. Brady .....	.85	3,000.
Feb. 3	Paul T. Brady .....	.85	5,000.
Feb. 4	Paul T. Brady .....	.85	9,000.
Feb. 5	Paul T. Brady .....	.85	1,000.
Feb. 10	Trowbridge & Niver .....	.80	\$ 13,000.
Feb. 11	Paul T. Brady .....	.85	1,000.
Feb. 11	Paul T. Brady .....	.85	12,000.

Date	To Whom Sold	Price	1st & Ref. 5's	Amount 1st & Ref. 6's
Feb. 11	Paul T. Brady .....	.85		2,000.
Feb. 14	Paul T. Brady .....	.85		2,000.
Feb. 17	Trowbridge & Niver .....	.80		35,000.
Feb. 24	Trowbridge & Niver .....	.80		30,000.
Feb. 25	Trowbridge & Niver .....	.80		12,000.
Feb. 25	Paul T. Brady .....	.85		1,000.
Mar. 1	Paul T. Brady .....	.85		5,000.
Mar. 2	Trowbridge & Niver .....	.80		13,000.
Mar. 9	Paul T. Brady .....	.85		10,000.
Mar. 10	Paul T. Brady .....	.85		8,000.
Mar. 10	Trowbridge & Niver .....	.80		20,000.
Mar. 14	Paul T. Brady .....	.85		2,000.
Mar. 16	Trowbridge & Niver .....	.80		13,000.
Mar. 18	Paul T. Brady .....	.85		1,000.
Mar. 19	Paul T. Brady .....	.85		1,000.
Mar. 22	Paul T. Brady .....	.85		5,000.

Mar. 23	Paul T. Brady .....	.85	2,000.
Mar. 25	Paul T. Brady .....	.85	2,000.
Mar. 28	Trowbridge & Niver .....	.80	13,000.
Mar. 31	Trowbridge & Niver .....	.80	54,000.
Mar. 31	Trowbridge & Niver .....	.80	12,000.
Apr. 7	Paul T. Brady .....	.85	5,000.
Apr. 12	Paul T. Brady .....	.85	1,000.
Apr. 21	MacNichol & Nichols .....	.80	1,000.
Apr. 22	Paul T. Brady .....	.85	1,000.
Apr. 27	Paul T. Brady .....	.85	1,000.
Apr. 29	Trowbridge & Niver .....	.80	6,000.
Apr. 30	Paul T. Brady .....	.85	1,000.
May 2	Trowbridge & Niver .....	.80	25,000.
May 2	Trowbridge & Niver .....	.80	25,000.
May 4	Paul T. Brady .....	.85	10,000.
May 10	Trowbridge & Niver .....	.80	12,000.
May 10	Wm. & S. Mainland .....	.80	44,000.
Mar. 13	Trowbridge & Niver .....	.80	17,000.

Date	To Whom Sold	Price	1st & Ref. 5's	Amount 1st & Ref. 6's
May 14	G. E. Knight .....	.89		10,000.
May 21	Trowbridge & Niver .....	.80		2,000.
May 21	Trowbridge & Niver .....	.80		5,000.
May 28	Paul T. Brady .....	.85		6,000.
June 7	Paul T. Brady .....	.85		1,000.
June 11	Paul T. Brady .....	.85		3,000.
June 18	Trowbridge & Niver .....	.80		16,000.
June 24	Paul T. Brady .....	.85		21,000.
June 30	Paul T. Brady .....	.85		5,000.
Total			\$35,000.	\$2,183,000.

(a) This and the following statements of bonds sold do not include bonds placed on "Underswriting."

BONDS SOLD JULY 1, 1910, TO JULY 1, 1911.

Date	To Whom Sold	Price	Amount		
			1st & Ref. 5's	1st & Ref. 6's	Consol. 6's
1910					
July 1	Trowbridge & Niver	.80	\$	\$ 3,000.	\$
July 2	Paul T. Brady	.85		1,000.	
July 7	Trowbridge & Niver	.80		6,000.	
July 7	Paul T. Brady	.85		1,000.	
July 8	Paul T. Brady	.85		2,000.	
July 11	Trowbridge & Niver	.80		2,000.	
July 18	Trowbridge & Niver	.80		5,000.	
July 18	Knight-McCague	.89		2,000.	
July 19	Col. T. & Svge. Bank.	.87 ¹ / ₂		4,000.	
July 21	Beierlein & Reynolds	.80		5,000.	
July 26	Beierlein & Reynolds	.80		12,000.	
July 26	Trowbridge & Niver	.80		1,000.	
July 26	Col. T. & Svge. Bank.	.87 ¹ / ₂		3,000.	
July 29	Paul T. Brady	.85		2,000.	

Date	To Whom Sold	Price	1st & Ref. 5's	Amount 1st & Ref. 6's	Consol. 6's
July 30	Paul T. Brady	.85		8,000.	
Aug. 3	Beierlein & Reynolds	.80		1,000.	
Aug. 8	Trowbridge & Niver	.80		1,000.	
Aug. 13	Paul T. Brady	.85		3,000.	
Aug. 18	Beierlein & Reynolds	.85		2,000.	
Aug. 26	Paul T. Brady	.85		1,000.	
Sep. 1	Beierlein & Reynolds	.80		4,000.	
Sep. 1	Beierlein & Reynolds	.80		1,000.	
Sep. 1	Trowbridge & Niver	.80		1,000.	
Sep. 19	Trowbridge & Niver	.80		11,000.	
Sep. 23	Newton R. Frost	1.00	5,000.		
Sep. 24	Paul T. Brady	.85		10,000.	
Sep. 27	Trowbridge & Niver	.80		3,000.	
Sep. 28	G. E. Knight	.89		10,000.	
Sep. 28	Trowbridge & Niver	.80		1,000.	
Sep. 29	Trowbridge & Niver	.95	5,000.		

Oct. 3	Paul T. Brady .....	.85		9,000.
Oct. 3	M. C. Claney	1.00	5,000.	
Oct. 4	Paul T. Brady .....	.85		5,000.
Oct. 5	Beierlein & Reynolds .....	.80		2,000.
Oct. 6	Beierlein & Reynolds .....	.80		3,000.
Oct. 10	Paul T. Brady .....	.85		6,000.
Oct. 10	MacNichol & Nichols .....	.95		1,000.
Oct. 10	Paul T. Brady .....	.85		6,000.
Oct. 14	Paul T. Brady .....	.85		10,000.
Oct. 17	Paul T. Brady .....	.85		7,000.
Oct. 17	Paul T. Brady .....	.85		32,000.
Oct. 18	Paul T. Brady .....	.85		10,000.
Oct. 19	Wm. & S. Mainland .....	.75	3,000.	
Oct. 31	McCague & Co. ....	.89		1,000.
Nov. 1	Paul T. Brady .....	.85		1,000.
Nov. 1	Paul T. Brady .....	.85		5,000.
Nov. 2	Paul T. Brady .....	.85		2,000.
Nov. 2	Paul T. Brady .....	.85		1,000.

Date	To Whom Sold	Price	1st & Ref. 5's	Amount 1st & Ref. 6's	Consol. 6's
Nov. 23	Beierlein & Reynolds . . . . .	.85		10,000.	
Dec. 1	Beierlein & Reynolds . . . . .	.85		1,000.	
Dec. 2	Beierlein & Reynolds . . . . .	.85		5,000.	
Dec. 5	Beierlein & Reynolds . . . . .	.85		1,000.	
Dec. 6	Paul T. Brady . . . . .	.85		5,000.	
Dec. 8	Paul T. Brady . . . . .	.85		1,000.	
Dec. 12	Paul T. Brady . . . . .	.85		15,000.	
Dec. 14	Beierlein & Reynolds . . . . .	.85		1,000.	
Dec. 15	Beierlein & Reynolds . . . . .	.85		1,000.	
Dec. 24	Beierlein & Reynolds . . . . .	.85		10,000.	
Dec. 28	MacNichol & Nichols . . . . .	.95		1,000.	
1911					
Jan. 14	Beierlein & Reynolds . . . . .	.85		1,000.	
Jan. 10	Wm. F. Cox . . . . .	.80			50,000
Jan. 17	Beierlein & Reynolds . . . . .	.85		2,000.	
Jan. 17	Paul T. Brady . . . . .	.85		5,000.	

Jan. 30	Beierlein & Reynolds	.85	1,000.	200,000
Jan. 31	Paul T. Brady	.85	2,000.	
Jan. 31	Wm. F. Cox	.80		
Feb. 3	McCague & Co.	.90	1,000.	
Feb. 3	Wm. F. Cox	.80		20,000.
Feb. 13	Wm. F. Cox	.80		10,000.
Feb. 13	Wm. F. Cox	.80		45,000.
Feb. 20	Beierlein & Reynolds	.85	6,000.	
Mar. 4	Wm. F. Cox	.80		10,000.
Mar. 13	Wm. F. Cox	.80		2,000.
Mar. 21	Wm. F. Cox	.80		15,000.
Mar. 22	Wm. F. Cox	.80		15,000.
Mar. 22	Wm. F. Cox	.80		2,000.
Mar. 24	Wm. F. Cox	.80		5,000.
Apr. 28	Wm. F. Cox	.80		5,000.
Apr. 29	Wm. F. Cox	.80		20,000.
May 4	Wm. F. Cox	.80		2,000.
May 12	Wm. F. Cox	.80		3,000.

Date	To Whom Sold	Price	Ist & Ref. 5's	Amount Ist & Ref. 6's	Consol. 6's
May 15	Trowbridge & Niver	.80		2,000.	2,000.
May 26	Wm. F. Cox	.80			7,000.
June 13	Wm. F. Cox	.80			
	Total		<u>18,000.</u>	<u>272,000.</u>	<u>413,000.</u>

BONDS SOLD, JULY 1, 1911, TO JULY 31, 1912.

Idaho-Oregon Light & Power Co., et al.

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Date	To Whom Sold	Price	1st & Ref. 5's	Amount 1st & Ref. 6's	Consol. 6's
1911					
Oct. 2	Wm. F. Cox90		7,000.	
Oct. 3	Wm. F. Cox .....	.90		12,000.	
Oct. 24	Westinghouse Co. ....	.70	10,000.		
Nov. 13	Westinghouse Co. ....	.70	20,000.		
Nov. 8	Kissel, Kinnicutt & Co. ....	.80			900,000.
Dec. 30	Wm. & S. Mainland .....	.75	3,000.		
1912					
Apr. 23	Kissel, Kinnicutt & Co. ....	.80			100,000.
Apr. 24	Kissel, Kinnicutt & Co. ....	.80			50,000.
May 17	Kissel, Kinnicutt & Co. ....	.80			150,000.
June 13	Kissel, Kinnicutt & Co. ....	.80			125,000.
Dec. 16	Bates & Rogers Con. Co. ....	.80			25,000.
	Total (Par Value)		33,000.	19,000.	1,350,000.
(a)	Red figures indicate bonds re-purchased (other than so-called "Underwriting" bonds.)				

Here the respondents rested, there was no rebuttal, and the testimony was closed.

The foregoing constitutes all the evidence adduced upon the trial of the issues relative to the 718 bonds here in question.

Respondents tender the foregoing and pray that it be allowed as a statement of evidence under Equity Rule 75.

Dated October 19th, 1914.

CAVANAUGH, BLAKE & MACLANE,
Solicitors for Respondents.

SUPPLEMENTAL STATEMENT SETTLED
AND ALLOWED UNDER EQUITY RULE 75
AT THE INSTANCE OF A. W. PRIEST,
ET AL., INTERVENERS AND CROSS-
APPELLANTS.

Upon the trial of the issues as to the 718 bonds the following proceedings, among others, were had:

“MR. CUMMINS: Now I wish to offer to prove that the property in question was advertised for sale on December 1, 1913; that theretofore a proposal to bid not less than \$1,500,000 for the property, if the property were offered not later than December 15th, had been made in writing; that no bid was in fact made on December 1, 1913; that the sale was continued to March 16, 1914, and that on that date there appeared, at the time and place named for such sale, a bidder representing or claiming to represent the Railway Company, or the interests connected there-

with, who offered \$1,000,000 for the property; that the receiver of the Idaho Railway, Light & Power Company was represented there by counsel, and, as a bondholder of the Idaho-Oregon Company, urged the acceptance of the bid. I am making that offer for the purpose of threshing out the question of its admissibility.

MR. MACLANE: There are some of those facts that I wouldn't admit at all, but I will make the general objection to the offer, in order to save time,—and I suppose that is Mr. Cummins' idea,—on the ground that it is irrelevant and immaterial, and not germane to the issues here involved. I believe the court has already ruled on practically that identical matter."

To which ruling of the Court counsel for interveners duly excepted, and still except, and which exception was allowed.

"MR. CUMMINS: I offer to prove, by a witness, that the Idaho Railway, Light & Power Company was placed in the hands of a receiver, under a bill filed by a creditor, on December 23, 1913, and has since been in the hands of such receiver.

MR. MACLANE: Objected to as irrelevant and immaterial.

THE COURT: The objection will be overruled. It may go in.

MR. CUMMINS: Will you admit it, Judge, or will you take the stand and answer a question?

MR. MACLANE: Admit what?

MR. CUMMINS: That a receiver was appointed for the Railway Company under a bill filed December 23, 1913?

MR. MACLANE: I certainly admit the fact, subject to the objection I have made. I will ask the court to what extent,—and I ask this for information, in view of what is might or might not be necessary to prove in our case,—the purpose for which that testimony is admitted,—to show the relation of the receiver as a party to the litigation?

THE COURT: I assumed that that was about all.

MR. MACLANE: There is no objection to it for that purpose.

MR. CUMMINS: And also the financial condition of the Railway Company."

Relative to the introduction in evidence of the Minutes of the meeting of the Executive Committee of the Idaho-Oregon Light & Power Company, held at the Chase National Bank, December 27th, 1912, the following proceedings were had:

"MR. MACLANE: We next offer in evidence, as Exhibit "B," an agreed copy of the minutes of the meeting of the Executive Committee of the Idaho-Oregon Light & Power Company held at Chase National Bank, December 27, 1912.

Said paper was thereupon marked Respondents' Exhibit B, re 718 Bonds.

MR. CUMMINS: We object to that on the ground that they have neither been identified nor approved

as being the minutes of the corporation. That is an agreed copy only in the sense that it is a copy from some pages found in this book. The minutes are not signed by anybody as secretary, and there has never been any proof by anybody that those are the minutes of any such meeting.

MR. MACLANE: We will offer in connection with those minutes the testimony of G. E. Hendee, the Secretary of the Company, identifying the minutes; we will offer his whole deposition, which has already been read here. In that deposition the minutes are identified. And I might also call the court's attention to the fact that a great part of the testimony of the Messrs. Mainland attacking those minutes was based upon copies of the minutes in Mr. Cummins' possession, which were shown to them at that time. And I believe he expressly referred to them in his questions as being minutes of that meeting. In connection with this offer, I read into this record this stipulation:

'It is hereby stipulated by and between solicitors for the respective parties herein that either of the parties hereto may, upon the hearing of any of the issues involved herein, offer in evidence any of the following record books of the defendant Idaho-Oregon Light & Power Company. Minutes of Board of Directors. Minutes of Stockholders. Minutes of Executive Committee. That upon said offer no proof of identification of said books shall be necessary, further than the statement of solicitor for said defendant, Idaho-Oregon Light & Power Company

that the books so offered are the record books of said defendant Company and have been received by him from the Secretary of said Company, G. E. Hendee, and are now in the custody of said solicitor, as Assistant Secretary of said Company, which said statement, together with the statement of fact that the books have not been altered while in his custody, the said solicitor may be required to verify by affidavit or oath at the request of any of the parties.'

I will state that those are minutes contained in the books which I received by express from G. E. Hendee; that they were not altered while in my custody, and that I kept them in my custody until a receiver was appointed in this cause and I was directed to turn them over to the receiver.

MR. CUMMINS: It is not disputed that that is the book which Mr. Hendee had, and that he sent it to Judge MacLane.

MR. MACLANE: And this stipulation is signed by Joseph Cummins, Richards & Haga, and John F. MacLane, and Alfred A. Fraser, Mr. Prussing.

THE COURT: Under that stipulation, Mr. Cummins, what have you to say as to this?

MR. CUMMINS: I don't think that stipulation waives our right to question those matters. The stipulation is intended for the purpose of permitting Judge MacLane to become custodian of the books, and to produce them here as the books, without bringing Mr. Hendee on here. I don't think that stipulation is intended to waive any right we have

to object to pages in there that contain no kind of authenticity on their face. We will admit all that he is claiming, that Mr. Hendee testified to the court that those are the books in his possession.

THE COURT: But the stipulation there, that anything in this book may be admitted in evidence?

MR. CUMMINS: No, not admitted,—may be offered as what it purports to be there.

THE COURT: It strikes me, gentlemen, that under this stipulation the offer of the books makes a *prima facie* case of the correctness of the minutes. Were it not for this stipulation, I would be bound to sustain the objection, but I can't see that it has any virtue unless it enables the person offering the book to have it received without further identification. What would the offer of the book mean? The book physically means nothing, of course; it is the contents of the book.

MR. CUMMINS: If the Court please, I wish to define our objection. Our objection is not to the admission of the paper under the stipulation, or the offer, but it is to the receipt of it as evidence that that is a correct record of the meeting held there.

THE COURT: I understand your objection. I think I shall have to overrule it."

To such ruling of the court counsel for the interveners duly excepted, and still except, and which exception was allowed by the court.

Thereafter further proceedings relative to the introduction of said Minutes were had as follows:

“MR. CUMMINS: If the Court please, I want to be perfectly clear about the status of the record of the alleged minutes of the meeting of December 27, 1912. Do I understand that it was admitted, as a part of the authenticated official record of the corporation? Is that its status in the record?

THE COURT: Yes. I don't mean by that to say that it is conclusive, but, as I understand, under the stipulation it comes in the same as though this particular entry had been identified as the minutes of that particular meeting. Whether or not the facts therein stated are true is another question, but they stand as the minutes of the company.

MR. CUMMINS: We are not satisfied, if the Court please, with that status in the record, and I will make this offer to counsel for the respondents, that we will admit that that is found in its proper chronological place in the official record book of the company that was in the possession of the secretary, and that it is in the same condition in which it was transmitted by the secretary to counsel last fall, at the time it was received by him, and shortly after which time this stipulation was made. I think that that is all the status, and we will make no objection to it going into the record under that admission. Other things in this record will explain all the other things about that record, and I think that is all the status to which the record is entitled. If counsel is willing that it shall be stricken out as it now stands and be admitted in that way, we have nothing further to say. Otherwise I have a motion to make.

MR. MACLANE: I think I shall rely on the ruling of the court.

MR. CUMMINS: If the Court please, the interveners desire to move to strike from the record the copy of an alleged record of the minutes of the Executive Committee of December 27, 1912; and we accompany that motion with the offer to admit it as a correct copy of certain pages found in the regular chronological order in the official record book of the company which was in the possession of the secretary of the company, and was, about October, 1913, transmitted by the secretary to counsel, being the book referred to in the stipulation which is on file herein. And in support of the motion I desire to read again, because the court has not heard read, the whole stipulation, and the proceedings that occurred in open court, in which reference was made to that stipulation. And then I desire to have Mr. Haga sworn.

THE COURT: Wasn't this stipulation filed relative to this particular hearing we are now having?

MR. CUMMINS: The Court will have to judge, I think. It was not filed—

THE COURT: What is the date of the stipulation?

MR. CUMMINS: The stipulation was filed October 7, 1913. Our bill in intervention was then on file. The answer of the Railway Company and of the Idaho-Oregon Company were not then on file. It was prepared under certain circumstances and for

certain purposes, as counsel who signed it for us understood at that time, and those circumstances and that purpose we think should be explained. And it certainly was not the understanding, as I am informed by counsel who signed it, that it was to have any such effect as this or was to be made use of in this way. The stipulation, of course, will have to stand for itself as to what it means. It is entitled in the cause, including A. W. Priest, et al, interveners.

(Mr. Cummins thereupon read the stipulation to the Court.)

Joseph Cummins and Richards & Haga was signed by Mr. Haga. That was on October 7; and the deposition of S. L. Fuller was heard in open court on October 21st, when the following proceedings were had. Mr. MacLane was conducting the direct examination of Mr. Fuller.

(Mr. Cummins read the following from Mr. Fuller's deposition: 'Mr. MACLANE: * * * In connection with the introduction of these corporate records, a stipulation has been entered into between Mr. Haga and myself, in order that these books might be brought here where they would be available to all parties and to the court, that identification of the records by the secretary of the company is waived, and that statement of counsel for the company that the records offered are the corporate records of the company shall be sufficient identification herein. That is correct, Mr. Haga? MR. HAGA: Unless we desire to cross-examine the secretary further for

identification. MR. MACLANE: My understanding of the stipulation is that they may be offered in evidence and that you have the privilege at any time of taking the secretary's deposition to cross-examine him further as to those records. MR. HAGA: Yes. MR. MACLANE: In other words, so far as identification at the present time for the purpose of offering these in evidence, the statement made is sufficient? MR. HAGA: Yes.')

"MR. CUMMINS: The Court will observe that in the stipulation and in the examination there is no reference to any secretary except Mr. Hendee. There is apparently no intimation that either party supposed there was anything in the books except records coming from Mr. Hendee, and signed by Mr. Hendee. Mr. Hendee was in New York, and the evident purpose of the stipulation is to avoid the necessity of bringing Mr. Hendee here for the purpose of identifying these as the records and his signature to the minutes. I would like to have Mr. Haga sworn.

O. O. HAGA, duly called and sworn as a witness for and on behalf of Interveners, in rebuttal, testified as follows:

Direct Examination by MR. CUMMINS:

Q. Mr. Haga, do you remember signing the stipulation which has just been read with Mr. MacLane?

A. Yes, sir.

Q. By whom was that stipulation prepared?

A. By Judge MacLane.

Q. And it was presented to you for signature?

A. Yes, sir.

Q. State in your own way the circumstances and the substance of the conversation that took place at that time.

MR. MACLANE: If the Court please, I have no objection to this being gone into, but I don't want, by being silent, to admit that the effect of the stipulation may be varied by the testimony of one of the parties to it.

A. Judge MacLane had informed me about that time, or a short time before, that he had received the records or minute books from New York, and that they were available for our examination; and he then explained that Mr. Hendee would not be here; that he was the secretary, and that there might be some difficulty about identifying the books; that he himself was assistant secretary, but didn't like to go on the stand to testify in the matter, but that he would state that there had been no alteration or change in the records since they came into his possession, and that he had received them from Mr. Hendee. And he was anxious to avoid the expense of bringing Mr. Hendee here for the mere purpose of identifying the records.

Q. At that time, to the best of your recollection, had you examined the books yourself?

A. I might have seen them, but I had not examined them, so far as I recall.

Q. Were you at the time aware that there was any purported or any pretended record in the book

that was not signed by the person said to act as secretary?

A. No, I was not.

Q. Did you know that there was anything in the book that did not purport to be records kept by Mr. Hendee himself, as secretary?

A. No, sir, I did not.

MR. CUMMINS: That is all.

MR. MACLANE: I haven't any questions.

I think the stipulation explains exactly what I intended, and what I relied upon, and it seems to me the ruling of the court is in exact accordance with the stipulation.

THE COURT: I will let it go in, subject to the objection as to whether or not an unsigned entry is an official record book of a corporation is admissible. I will hear you later on that."

To the ruling of the Court admitting in evidence the minutes of the meeting of December 27th, 1912, and overruling the motion of counsel for the interveners to strike such minutes or exhibit from the record, counsel for interveners duly excepted, and still except, and such exception was allowed by the Court.

"MR. CUMMINS:

Q. Mr. Haga, was Mr. Sinclair Mainland here in Boise and present in the court room during the taking of the deposition of Mr. Fuller which I have read?

A. He was.

THE COURT: It simply remains open as a question of law whether or not this entry, being unsigned, is to be regarded as competent evidence of anything.

MR. CUMMINS: If it will clarify the matter at all, we are perfectly willing to stipulate that if Mr. Hendee were here he would testify that he received this from Mr. Wickes as the record of the meeting of that Executive Committee, and he copied it into the books. In other words, we are perfectly satisfied to have all the facts appear."

Counsel for Interveners also offered in evidence a circular of the so-called New York Committee to the bondholders of the Idaho-Oregon Light & Power Company, dated March 26th, 1913, being the circular signed by Samuel L. Fuller and others as a Committee, and the same was marked "Interveners' Exhibit No. 34, Re 718 Bonds." The offer was objected to by counsel for the Railway Company and its Receiver, as incompetent, irrelevant and immaterial, and not germane to any issue which is involved and now on trial; which objection was sustained by the Court. And to such ruling of the court counsel for interveners duly excepted, and still except, and such exception was allowed. A true copy of said circular is attached to the answer of the State Bank of Chicago, Trustee, as Exhibit "A," and, being already a part of the record, the same is not herein set forth at length.

Whereupon counsel for the interveners offered in evidence a circular from the same Committee, dated

May 1st, 1913, addressed to the holders of the bonds of the Idaho-Oregon Company, and asked that the same be received in evidence. The same was marked "Intervenors' Exhibit No. 35, Re 718 Bonds." And to such offer the same objection was made as to the previous circular by counsel for the Idaho Railway Company and its Receiver, and such objection was sustained. To which ruling of the Court counsel for the intervenors duly excepted, and still except, and such exception was allowed by the court. A true copy of said circular is attached to the answer of the State Bank of Chicago, Trustee, to the bill in intervention of said intervenors, as Exhibit "C," and, being already a part of the record in the cause it is not herein set forth at length.

Counsel for the intervenors offered the following portion of the testimony of Samuel L. Fuller upon cross-examination for the purpose of showing the course of dealings by the Railway Company and the people controlling it with the Idaho-Oregon Company and its properties, as having a bearing upon the question of their good faith in such dealing; to all of which counsel for the Railway Company and its Receiver objected, on the ground that it is irrelevant and immaterial and not germane to the issues on trial as framed by the Court's order, which objection was sustained. And to such ruling of the Court counsel for intervenors duly excepted, and still except, and such exception was allowed.

The evidence so excluded was from the deposition of Samuel L. Fuller, and is as follows:

“Q. At the invitation of yourself as Chairman of the New York Committee, a conference was held at your office in New York in April, 1913, with reference to the assembling of these bonds in the hands of the New York Committee, was there not?

A. Yes.

Q. Who took part in that conference?

A. Mr. Reynolds, Mr. McCoy, Mr. Parmlee of White & Co. of New York, Mr. Seymour, Mr. Byllesby—not Byllesby—Beardsley, Mr. Paul Brady, Mr. Bisby, Mr. Richmond and myself.

Q. You have forgotten Mr. Speer, haven't you?

A. I had forgotten Mr. Speer—and Mr. Speer.

Q. Mr. McCoy was already a member of the New York Protective Committee?

A. Yes, Mr. McCoy was a member of the Protective Committee.

Q. And Mr. Bisby was counsel for the New York Committee?

A. Yes.

Q. And Mr. Richmond was a member of the New York Protective Committee?

A. Yes.

Q. The persons then assuming to speak for and represent the views of the bondholders were Mr. Reynolds, Mr. Parmlee, Mr. Seymour, Mr. Beardsley, Mr. Brady and Mr. Speer?

A. Yes. McCoy.

Q. Mr. McCoy didn't hold any bonds, did he?

A. Mr. McCoy probably represents more bonds than anybody.

Q. Mr. McCoy was a member of the New York Committee?

A. Yes, but he represented—

Q. His position was already established?

A. There wasn't any position established when we had this meeting. We met to establish a position, but no position was established.

Q. The New York Committee already had its plans and purposes?

A. Which they abandoned, and they went and met these gentlemen to get up a new plan, and these people went at it from an entirely new view point.

Q. Are you clear that Mr. Brady was present at this conference?

A. He was present at some of the conferences. I remember he was very active in regard to the situation.

Q. Mr. Reynolds is a broker in Chicago, is he not?

A. Yes, I believe so.

Q. Mr. Parmlee is a member of and connected with White & Company of New York?

A. Yes.

Q. Mr. Beardsley is a broker?

A. Yes.

Q. Mr. Seymour is a broker?

A. Yes.

Q. And Mr. Speer is a broker?

A. I believe so.

Q. Did you invite to that conference any owner of bonds who was not a broker?

A. No, we invited the people who said they represented the bondholders, and we were told that these people represented a very large number of bonds. From a practical view point we couldn't very well have a whole lot of bondholders to ask; the bondholders held in very small amounts, scattered all over the country. It was impracticable to have a great big meeting, to have a camp meeting on a situation of this sort, and we got together everybody we knew of who had been interested in these securities that it was practicable to get together. We tried to get together the representatives of the bondholders as they appeared to us.

Q. They were the bondholders who had sold bonds?

A. Yes, they had sold some bonds.

Q. The purpose of this meeting was to obtain an agreement with the brokers whereby they would recommend to their customers the deposit of their bonds with the New York Committee?

A. The purpose of this meeting was to get together and get up a plan that everybody thought was fair and reasonable under the circumstances.

Q. How long were these gentlemen there in New York, how long did these conferences continue?

A. I should say a week or ten days, a long time.

Q. They came at your invitation, did they not?

A. Yes.

Q. Who paid their expenses on this trip?

A. I believe we did, the Committee did.

Q. The New York Committee paid their expenses?

A. Yes, including Mr. Speer's expenses.

Q. Including Mr. Speer's expenses. At the termination of this conference there was an agreement, was there not, that the brokers should immediately write to their customers recommending the deposit of the bonds with the New York Committee under a new agreement which was put out practically immediately?

A. The final agreement was made, Mr. Cummins, not by me, with these people; the final agreement was prepared by these different brokers, and Mr. Bisby and Mr. Richmond, and they all agreed on the thing. I wasn't in the conference the last day, when the final agreement was made as to the terms, but, with that preamble, if you will ask me a question I will answer it.

Q. There was an agreement then at the close of the conferences that the brokers should, as soon as the new deposit agreement was put out, write to their customers recommending the deposit of the bonds under that agreement?

A. There was an understanding that the plan as agreed upon was satisfactory to all the parties there,

and that they would do what they could to put the plan through along those lines.

Q. And all of these gentlemen, that is, Reynolds, McCoy, Parmlee, Seymour, Beardsley and Speer wrote such letters to their customers?

A. I don't think Mr. Speer did, and I don't know what the other firms wrote. I know the result of the meeting was that a large number of bonds were in due course deposited with the Committee, but I don't ever remember seeing any letters that were written by any of these firms to their customers. White may have shown me a letter; my memory on that is a little hazy. I never considered it very important one way or the other. They all thought the plan was fair and reasonable and would do their best to relieve this Idaho-Oregon situation and the difficulties in which it was placed."

Whereupon counsel for the interveners offered the portion of the deposition of Samuel L. Fuller hereinafter set out, the same being taken from the cross-examination of said Fuller. And to such offer counsel for the Railway Company and its Receiver objected on the ground that it was irrelevant and immaterial and not germane to the issues on trial as framed by the Court's order; which objection was sustained by the Court. And to such ruling of the Court counsel for the interveners duly excepted, and still except, and such exception was allowed.

The portion of the deposition of said Samuel L. Fuller so excluded reads as follows:

“Q. What efforts did the New York Committee ever make, after putting out the plan of May 1st, 1913, to obtain the assent of the bondholders to that plan?

A. The New York Committee as a committee didn't do anything at all.

Q. Never sent out any letters?

A. Yes, they sent out their circulars and letters, but no personal conversation was had by any members of the Committee. I think one of our bond salesmen who travels up the state spoke to some people up there who held bonds.

Q. You did send out a number of letters from time to time?

A. We have sent out letters, as you know, right straight along.

Q. And the deposit agreement fixed and limited the time within which the bonds might be deposited?

A. Yes.

Q. That was afterwards extended?

A. Yes.

Q. And letters were sent out from time to time, that if they didn't come in within the time fixed they couldn't participate in the benefits of the reorganization?

A. I think letters were sent out from time to time. I don't think pressure was brought to bear.

Q. Did the New York Committee pay for the ex-

pense of sending out the circular letters sent out by the bond dealers?

A. I don't think so.

Q. None of them?

A. I don't think so.

Q. Do you know?

A. Well, I am willing to say no, but I don't remember ever having had any payments made of that sort or character.

Q. Did the New York Committee employ anybody to solicit the deposit of bonds?

A. The New York Committee told some dealers that if they had clients and had the opportunity of seeing them—the New York Committee had no way of going around and seeing the people, and they told our dealers that if they went to any expense, to cover any expense they might incur in seeing their clients and telling them the story, a remuneration of one per cent on the bonds deposited would be paid to such dealers, and such remuneration has been paid in a number of instances.

Q. And that offer was made to all of the brokers that participated in that meeting?

A. I think it was made to some of them. I think we paid more to people who weren't in there. There was some firm down in Cincinnati, Seasongood & Mayer—is it? I think they have turned in some bonds.

Q. They have been connected with the sale of the bonds in the first place?

A. I never knew that they had at all. They wrote in and said they had some bonds.

Q. But you did pay commissions to the brokers connected with the sale of the bonds?

A. Where such commissions were demanded by the brokers to cover their expenses. It wasn't given as an incentive to make the brokers do it, but it was given to cover legitimate expenses that might be incurred in that connection.

Q. That commission was one per cent.

A. I think it is one per cent.

Q. Will you state to what broker you paid such commission for obtaining the deposit of bonds?

A. I will be very glad to, if I can remember them. We paid something to Reynolds, a very small amount—I don't know how much we paid; some commission to a firm by the name of Anderson—I think it is Shapter & Anderson—and this firm down in Cincinnati—I am not sure that is the name of the firm, by the way. I think that is all.

Q. Did you pay commissions to Rudolph Clibolty?

A. I think that is the man instead of Seasongood. Cross out Seasongood and put in Clibolty. I think that is all. That is all I remember, anyway."

The within and foregoing statement of evidence being tendered to me for settlement and allowance, together with the supplemental statement of Inter-

veners, A. W. Priest, et al., as cross-appellants, and it appearing to me that said statement and supplemental statement were lodged in due time with the Clerk of this Court, and notice of such lodgment and of the time of the proposed settlement appearing to have been given to all parties by their counsel, and all amendments and objections having been considered, and the statement and supplemental statement, with such amendments as have been allowed having been duly engrossed, it is certified that said statement and supplemental statement are in all respects true and correct and contain a full transcript of the evidence reduced to narrative form pertaining to the issue of the said 718 bonds upon which the decree entered herein on the 19th day of September, 1914, is based and a true statement of the exceptions taken by the said interveners and proposed cross-appellants, and it is further ordered that said statement and supplemental statement shall be transmitted to the Circuit Court of Appeals as a single statement for use on both the appeal and cross-appeal.

Dated November 3, 1914.

FRANK S. DIETRICH,
District Judge.

IN EQUITY NO. 444.—PETITION FOR APPEAL
AND ORDER ALLOWING SAME.

*District Court of the United States, for the District
of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,
Plaintiff,

v.

IDAHO OREGON LIGHT & POWER CO., BANK-
ERS TRUST COMPANY and F. N. B. CLOSE,
Defendants,

and

A. W. PRIEST, et al.,
Interveners.

Idaho-Oregon Light and Power Company, Idaho Railway Light & Power Company, and O. G. F. Markhus, as Receiver of Idaho Railway Light & Power Company, respondents to the Bill in Intervention of A. W. Priest, et al., in the above cause, feeling themselves aggrieved by the decree made and entered on said Bill in Intervention by the above entitled Court in said cause on the 19th day of September, A. D., 1914, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors, which is filed herewith, and do pray that this appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco in said Circuit.

And your petitioners further pray that the proper order touching the security to be required of them

to perfect the appeal be made, and, desiring to supersede the execution of the decree, petitioners here tender bond in such amount as the Court may require for such purpose, and pray that with the allowance of the appeal a supersedeas be issued.

CAVANAH, BLAKE & MACLANE,
Solicitors for Petitioners Idaho-Oregon Light & Power Company, and O. G. F. Markhus, as Receiver Idaho Railway, Light & Power Company.

A. A. FRASER,
Solicitor for Idaho Railway, Light & Power Company.

ORDER ALLOWING APPEAL.

And now, to-wit, on the 2d day of November, 1914, it is ordered that the petition be granted, and that the appeal be allowed as prayed for, and that the same shall operate as a supersedeas upon the petitioners filing bond in the sum of \$50,000 with sufficient sureties to be conditioned as required by law.

FRANK S. DIETRICH,
District Judge.

Service of the foregoing petition and receipt of copy thereof admitted this 2d day of November, 1914.

RICHARDS & HAGA,
Solicitors for Interveners A. W. Priest, et al., and for W. J. Ferris, Receiver Idaho-Oregon Light & Power Co., and for Intervener A. H. Sundles.

PERKY & CROW,
Solicitors for Defendants Bankers Trust Co., and F. N. B. Close.

SULLIVAN & SULLIVAN,

Solicitors for Plaintiff State Bank of Chicago.

J. L. McCLEAR,

Solicitor for Intervener United States of America.

JESS HAWLEY and

H. R. WALDO,

Solicitors for Interveners Idaho Power & Light Co.,
and General Electric Company.

C. S. HUNTER,

Solicitor for Intervener Westinghouse Electric &
Manufacturing Company.

WOOD & DRISCOLL,

Solicitors for Intervener American Steel & Wire
Company.

(Endorsed): Filed Nov. 2, 1914. A. L. Richardson, Clerk.

IN EQUITY NO. 444.—ON BILL IN INTERVENTION OF A. W. PRIEST, ET AL.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,

Plaintiff,

v.

IDAHO-OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY, and F. N. B.
CLOSE,

Defendants,

and

A. W. PRIEST, et al.,

Interveners.

ASSIGNMENT OF ERRORS.

Now, on this 2d day of November, A. D. 1914, come the respondents to the bill in intervention of A. W. Priest, et al., to-wit, Idaho-Oregon Light & Power Company, Idaho Railway, Light & Power Company, and O. G. F. Markhus, as Receiver of Idaho Railway, Light & Power Company, by their solicitors, Cavanah, Blake & MacLane, and having prayed for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree entered on said bill in intervention of A. W. Priest and others in said cause on the 19th day of September, 1914, say that the said decree is erroneous and unjust to the said defendants and to each of them in the following particulars:

I.

Because the said Court erred in sustaining said Bill in Intervention and entering Decree thereon.

II.

Because the said Court erred in holding and decreeing that the agreement of September 25, 1912, for exchange of bonds of the issue secured by the mortgage to the plaintiff having a par value of \$500,000, for junior or consolidated First and Refunding bonds secured by mortgage to the defendants, Bankers Trust Company and F. N. B. Close, having a like par value of \$500,000, and the exchange of such bonds made in pursuance thereof to be illegal and void, and in holding and decreeing that respondent, Idaho Railway, Light & Power Company is not en-

titled to share in the proceeds of the mortgage sale of the property covered by the mortgage to the plaintiff as the owner of said bonds, except as thereafter provided in said decree.

III.

Because the said Court erred in holding and decreeing that at the time of said agreement of September 25, 1912, by which the said Idaho Railway, Light & Power Company was to loan \$250,000, to said Idaho-Oregon Light & Power Company, that the latter company was entitled at that time to receive upon demand \$140,000 in payment for second or consolidated bonds to the par value of \$175,000.00.

IV.

Because the said Court erred in holding and decreeing that all said transactions, to-wit, agreement for and making said loan the release of the Idaho-Oregon Light & Power Company of its right to demand and receive \$140,000, in payment for \$175,000, par value of consolidated bonds, the agreement for exchange of bonds by which the said Idaho-Oregon Light & Power Company surrendered first mortgage bonds and received back second or consolidated bonds and the several deposits and exchanges of the collateral in connection therewith were connected and inter-dependent and all constituted a consideration for the other.

V.

Because the said Court erred in holding and decreeing that said Idaho-Oregon Light & Power Com-

pany by its Receiver, W. J. Ferris, is entitled to receive back from said Idaho Railway, Light & Power Company the 440 First Mortgage Bonds secured by trust deed to the plaintiff and exchanged as part of said transaction.

VI.

Because said Court erred in holding and decreeing that said Idaho Railway, Light & Power Company, by its Receiver, O. G. F. Markhus, is entitled to receive back from said Idaho-Oregon Light & Power Company second mortgage or consolidated bonds to the amount of \$440,000, which said Idaho Railway, Light & Power Company gave in said exchange.

VII.

Because said Court erred in holding and decreeing that said Idaho Railway, Light & Power Company, by its Receiver is entitled to recover back from said Idaho-Oregon Light & Power Company the sum of \$110,000, being the amount advanced or loaned by said Idaho Railway, Light & Power Company to said Idaho-Oregon Light & Power Company in excess of \$140,000, which said Power Company was entitled to receive.

VIII.

Because the said Court erred in holding and decreeing that said Idaho-Oregon Light & Power Company by its Receiver is entitled to the possession as collateral security for the repayment of said \$110,000 and interest, of the 440 first mortgage bonds

originally deposited by said Idaho-Oregon Light & Power Company as collateral for the loan agreed to be made on September 25, 1912.

IX.

Because the Court erred in holding and decreeing that said \$440,000 of the first mortgage bonds were at the time of the decree, or otherwise, in possession of said Idaho Railway, Light & Power Company, or its receiver.

X.

Because the said Court erred in holding and decreeing that the said Receiver holds said bonds not as property of said Idaho Railway, Light & Power Company, but as collateral to an indebtedness of \$110,000, and interest.

XI.

Because the said Court erred in holding and decreeing that all second mortgage or consolidated bonds held by said Idaho Railway, Light & Power Company, or its Receiver, as collateral to said indebtedness growing out of said agreement of September 25, 1912, be surrendered by said Idaho Railway, Light & Power Company and its Receiver to said W. J. Ferris, Receiver of said Idaho-Oregon Light & Power Company.

XII.

Because the said Court erred in holding and decreeing that upon sale of the mortgaged property under foreclosure the said Idaho Railway, Light & Power Company, or its Receiver, be entitled to share

in the proceeds thereof as the holder of said 440 bonds as collateral to secure the said indebtedness of \$110,000, and interest.

XIII.

Because the said Court erred in refusing to hold and decree that the said Idaho Railway, Light & Power Company, or its Receiver by virtue of said agreement of September 25, 1912, and the exchange of bonds made thereunder, was the absolute owner of \$500,000 face and par value of said so-called first mortgage bonds secured by mortgage to the plaintiff, State Bank of Chicago, and entitled to share in the distribution of the proceeds of foreclosure sale on that basis.

XIV.

Because the said Court erred in refusing to hold and decree that the said Idaho Railway, Light & Power Company, or its Receiver, was the owner of \$440,000 face value of said so-called first mortgage bonds secured by the mortgage to the plaintiff, and entitled to share in the distribution of the proceeds of foreclosure sale on that basis.

XV.

Because the said Court erred in refusing to hold and decree that the said agreement of September 25, 1912, and all transactions had thereunder were valid and enforceable.

XVI.

Because the said Court erred, on decreeing that said contract of September 25, 1912, was invalid in

refusing to hold and decree that the said Idaho Railway, Light & Power Company or its Receiver were nevertheless entitled to hold all bonds secured by it under said transaction, and to share in the distribution of the proceeds thereof up to the amount advanced by said Idaho Railway, Light & Power Company under the said contract of September 25, 1912, to-wit, \$250,000, with interest at the rate of six per cent per annum from the dates of the various advances thereof as shown by the evidence, to-wit, on \$100,000 from October 4, 1912, on \$20,000 from October 31, 1912, on \$60,000 from December 11, 1912, on \$40,000 from December 6, 1912, on \$30,000 from January 3, 1913.

XVII.

Because the Court erred in holding and decreeing that the agreement for further exchange of bonds made in December, 1912, under which bonds of the par value of \$278,000, secured by the mortgage to the plaintiff, were procured by surrender of the so-called second mortgage or consolidated bonds secured by the mortgage to the Bankers Trust Company and F. N. B. Close, and under which agreement bonds of the par value of \$278,000 were exchanged, was illegal and void, and the exchange of said bonds invalid and fraudulent, and erred in holding and decreeing that said Idaho Railway, Light & Power Company, or its Receiver, should return to Idaho-Oregon Light & Power Company, or its Receiver, the said first mortgage bonds of the par value of \$278,000.00.

XVIII.

Because the Court erred in holding and decreeing that the Idaho Railway, Light & Power Company is entitled to receive from Idaho-Oregon Light & Power Company second or consolidated mortgage bonds secured by the mortgage to the Bankers Trust Company and F. N. B. Close to the par value of \$175,000 on account of \$140,000 charged against advances to the Idaho-Oregon Company, and erred in holding and decreeing that upon sale under foreclosure, said Idaho Railway, Light & Power Company should be entitled to share in the distribution of the surplus for second mortgage bondholders as holder of such bonds to the par value of \$175,000 in addition to other second mortgage bonds held by it.

XIX.

Because the said Court erred in refusing to hold and decree that the said contract of December, 1912, for exchange of consolidated or second mortgage bonds for first mortgage bonds secured by the mortgage to the plaintiff was in all respects a valid and binding contract, and further erred in refusing to hold or decree that said exchange of bonds of the par value of \$278,000 made under said contract was a legal and valid exchange and vested title in said 278 first mortgage bonds in said Idaho Railway, Light & Power Company, or its Receiver.

XX.

Because the said Court erred in refusing to hold and decree that the Idaho Railway, Light & Power

Company parted with valuable consideration in said exchange of 278 bonds last mentioned, and erred in refusing to decree it any reimbursement on account thereof upon ordering surrender of the so-called first mortgage bonds received under such exchange.

XXI.

That the Court erred in refusing to decree that the said Idaho Railway, Light & Power Company, or its Receiver, were the lawful owners and holders of said 718 bonds procured in said exchanges by virtue of said contracts hereinbefore mentioned in these assignments and in said decree, and entitled to share in the distribution as owners thereof.

XXII.

That the said Court erred in holding that said interveners, A. W. Priest, and others, as bondholders, were entitled to raise the question of the validity of the said contracts of September 25, 1912, and of the exchange of the bonds made thereunder.

XXIII.

That the said Court erred in admitting the following evidence over the objection of the respondents as herein noted.

MR. CUMMINS: The interveners now offer page two of the monthly report of operations of the Idaho Railway, Light & Power Company, for December, 1912, which was introduced as Exhibit 4, Fuller's Cross-Examination. It shows the gross earnings for the month of December, 1912, and for the twelve months then ending also the operating expenses, the

net from operation, taxes, net from operation and taxes, non-operating revenues, railway rental, amount available for fixed charges, the amount of interest, rental of joint facilities, total fixed charges, surplus, and construction account. It is offered for the purpose of showing the condition of the Railway Company in 1912, as establishing a motive, or tending to establish a motive, for the transaction which is in issue here. I might say in this connection that I expect to offer, for the same reasons, another sheet of the same report, and corresponding sheets of the same months of the Idaho-Oregon for the purpose of showing the conditions of these two companies at that time.

To which said offer said respondents, by their counsel, duly objected on the ground that the same was irrelevant, immaterial, not germane to the issues on trial, nor within the allegations which the respondents were by the order of the Court directed to answer, but involves matters entirely foreign thereto, and which respondents were expressly excused by the Court's order from answering, which said objection was by the Court overruled, in the following language:

"This is somewhat remote but I think perhaps I shall let it go in. it may have some bearing upon the good faith and reasonableness of the transaction. The objections will be overruled."

To which said ruling respondents, by their counsel, duly excepted, and still except, and which said exception was by the Court allowed.

Interveners Exhibit No. 5 was thereupon read in evidence, being said sheet showing the results of operation of the said respondent, Idaho Railway, Light & Power Company, for the month of December, 1912, showing for that months and for the twelve months of 1912 the earnings, operating expenses, taxes, non-operating revenue, railway rental and net earnings, of said respondent Idaho Railway, Light & Power Company, and the fixed charges against the operation of the same with interest during construction.

XXIV.

The said Court erred in permitting the following question over the objection of the said respondents, therein noted, to which answer was made as herein stated:

MR. CUMMINS: (Continuing reading Fuller Deposition). Q. This report shows earnings for twelve months of \$165,471.71, and net from operations and taxes, \$111,636.82; non-operating revenue \$24,898.43; railway rental \$89,604.49, making available for fixed charges \$246,139.74. Will you state the character and from what source derived was the non-operating revenue of nearly \$45,000?

To which question counsel for respondents objected on the ground that the same was irrelevant and immaterial and not germane to the issues on trial, nor within the allegations which the respondents were directed to answer, which said objection was by the Court overruled, and to which said ruling the said respondents, by their counsel, duly excepted

and now except, and which said exception was allowed.

A. "I presume this is the income from the Idaho-Oregon securities held by the Railway Company." Such second mortgage bonds as the Railway held at that time. This interest was paid in November, 1912, but not in May, 1913. The item \$86,604.49, designated railway rental is the net earnings of the Railway Company, which at that time was only partially built, interurban street railway lines in course of construction; The gross earnings less operating expenses and taxes; that is the ordinary expenses of operation of the traction property, the company being charged with current furnished by the Railway Company at a price of one and one-half cents per kilowatt hour.

XXV.

The Court erred in permitting the following evidence to be admitted pursuant to the offer and over the objection herein stated.

MR. CUMMINS: "I have heretofore offered sheet two of the monthly operating report of the Idaho Railway, Light & Power Company for December, 1912. I now desire to offer sheet eight of the same report, showing the liabilities of the Company. It is the balance sheet * * * as of December 31, 1912."

To which offer respondents, by their counsel, then and there objected, on the ground that the same is irrelevant and immaterial, and not germane to the issues on trial, which said objection was by the Court

overruled, and to which said ruling the respondents, by their counsel, duly excepted, and still except, and which said exception was by the Court allowed.

Intervenors Exhibit No. 27 was thereupon admitted, being condensed balance sheet of said respondent, Idaho Railway, Light & Power Company, as of December 31, 1912, showing the assets and liabilities of the Company as of November 30, 1912, and of December 31, 1912.

XXVI.

The Court erred in admitting the following evidence pursuant to the offer and over the objection herein stated.

MR. CUMMINS: "I also offer sheet two of the monthly operating report of September, 1912, of the Idaho Railway, Light & Power Company."

To which offer respondents, by their counsel, then and there duly objected, on the ground that the same was irrelevant, immaterial and not germane to the issues involved, which said objection was by the Court overruled, and to which ruling respondents, by their counsel then and there excepted, and still except, and which said exception was by the Court allowed.

Thereupon intervenors Exhibit No. 28 was received in evidence, being a statement of results of operation of the respondent, Idaho Railway, Light & Power Company, for the month of September, 1912, and for the nine months of said year 1912, ending with September 30, 1912, showing gross earnings,

operating expenses, taxes, net earnings, non-operating revenue, railway rental and the amount available for fixed charges with said fixed charges, surplus and construction account with tabulated statement of interest bearing securities of said Company.

XXVII.

The Court erred in admitting the following evidence pursuant to offer and over the objection herein stated.

MR. CUMMINS: I offer sheet eight of the same report.

To which said offer counsel for respondents then and there duly objected on the ground that the same is irrelevant and immaterial and not germane to the issues involved, which said objections were by the Court overruled, to which ruling said respondents, by their counsel then and there duly excepted, and still except, and which said exception was by the Court allowed.

Thereupon interveners Exhibit No. 29 was read in evidence, being condensed general balance sheet of respondent, Idaho Railway, Light & Power Company, showing the property, plant, equipment, total assets and liabilities of the respondent, Idaho Railway, Light & Power Company, as of August 31st and of September 30, 1912.

XXVIII.

The Court erred in admitting the following evidence pursuant to offer and over the objection herein stated.

MR. CUMMINS: I offer sheet two of the monthly operating report of the Idaho-Oregon Light & Power Company for the month of September, 1912; sheet eight of the same report; and sheet two and eight of the report of said Company for December, 1912.

To which said offer and to each part thereof, respondents, by their counsel, duly objected on the ground that the same was irrelevant, immaterial and not germane to the issues involved in the cause, which respondents were directed to answer, and which said objection was by the Court overruled, and the said sheets and each of them were admitted by the Court "for the purpose of showing the status of the business of the Idaho-Oregon Company as bearing upon the real value of the bonds," to which said ruling of the Court the said respondents, by their counsel, then and there duly excepted, and still except, and which said exception was by the Court allowed.

Said pages from said reports were thereupon introduced in evidence, being interveners Exhibit No. 30, results of operation of respondent, Idaho-Oregon Light & Power Company, for the month of September, 1912, and for the nine months of the year 1912, ending September 30th, 1912, both as compared with the year 1911, and showing gross earnings, operating expenses, net earnings, taxes and fixed charges and like data. Also interveners Exhibit No. 31, being condensed balance sheet of respondent, Idaho-Oregon Light & Power Company, showing its total assets and liabilities of August 31st and September 30th, 1912.

Also interveners Exhibit No. 32, showing results of operation for said respondent, Idaho-Oregon Light & Power Company, for December, 1912, as compared with December, 1911, and for the twelve months of 1912, as compared with the twelve months of 1911, including gross earnings, operating expenses, taxes and fixed charges of said report for said period.

Also interveners Exhibit No. 33, being condensed balance sheet of the respondent, Idaho-Oregon Light & Power Company showing the assets and liabilities of said Company as of November 30th and as of December 31, 1911.

XXIX.

The Court erred in admitting the following evidence pursuant to offer and over the objection herein stated.

MR. CUMMINS: I offer a sheet showing the gross earnings, the operating expenses, and net earnings of the Idaho-Oregon Company for each year from 1907 to 1912, inclusive, and ask that it be marked interveners Exhibit No. 40, re 718 bonds. These figures are derived from audits of the books of the Company, made by Marwick, Mitchell, Peat & Company, chartered accountants; first, an audit for the four years ending December 31, 1910, dated New York, May 8, 1911, addressed to William Mainland, Esq., President of the Idaho-Oregon Light & Power Company. A part of the report reads as follows: "The balance sheet submitted, attached to our report of even date, in our opinion is a full and fair presentation of the financial position of the Company as of

December 31, 1910, excluding any contingent liabilities or uncompleted contracts. * * * The operations of the company during the period of four years under review, after charging off all expenses applicable thereto, including maintenance and renewals, but before making provision in respect to depreciation of the physical properties, the amount of which, however, would be of relatively minor importance, during this period, resulted as follows:"

MR. MACLANE: The opinions of the accountants as to whether these are proper or otherwise, except as stated in the audit themselves, it would seem to me would hardly, * * * We don't want to permit the inference to be drawn that we are bound by the running commentaries of the auditors on their own audit.

MR. CUMMINS: Not at all. The audit for the year 1911 is addressed to the Board of Directors of the Idaho-Oregon Light & Power Company, and is dated May 8, 1912. The audit for the year 1912 is addressed to the Board of Directors of the Idaho-Oregon Light & Power Company, and is dated April 3, 1913. I understand that it is admitted, subject only to the general objection as to its materiality.

To which said offer respondents, by their counsel, then and there objected on the ground that the same was irrelevant and immaterial to the issues involved, which said objection was by the Court overruled, and to which ruling respondents by their counsel excepted, and still except, and which said exception was by the Court allowed.

Thereupon the said Exhibit was introduced in evidence as interveners Exhibit No. 40, being as follows:

Year	Gross Earnings	Operating Expenses	Net Earnings
1907.....	189,045.89	98,586.48	90,459.41
1908.....	196,416.16	83,438.80	112,977.36
1909.....	215,579.57	73,531.31	142,048.26
1910.....	297,041.43	82,526.01	214,515.42
1911.....	361,297.47	128,399.62	232,897.85
1912.....	405,210.21	189,318.10	215,892.11

XXX.

The Court erred in admitting the following evidence pursuant to offer and over the objection herein stated.

The following, being a request upon the Trustee to foreclose the mortgage to the plaintiff, State Bank of Chicago, was offered in evidence, to which offer the respondents, by their counsel, duly objected on the ground that the same was incompetent, irrelevant and immaterial, not germane to the issues on trial, and referred to matters transpiring long subsequent to any of such issues, which objection was by the court overruled, and to which ruling the respondents by their counsel duly excepted, and which exception was by the Court allowed.

The instrument was thereupon received in evidence, being interveners Exhibit No. 39, a written notice by a committee of holders of bonds secured by the mortgage to the plaintiff of the default of the

Idaho-Oregon Light & Power Company in failing to pay interest due April 1st, 1913, upon said bonds, and a request upon the Trustee to foreclose the said mortgage on account of said default.

WHEREFORE, the said respondents, hereinabove named, pray that said decree be reversed and the District Court directed to dismiss the bill in intervention of the interveners, A. W. Priest, et al., and to render such decree as shall be meet and just.

CAVANAH, BLAKE & MACLANE,
Solicitors for Respondents, Idaho-Oregon Light & Power Company, and O. G. F. Markhus, as Receiver of Idaho Railway, Light & Power Company.

A. A. FRASER,
Solicitor for Idaho Railway, Light & Power Company.

Service of the foregoing assignment of errors and receipt of copy thereof admitted this 2nd day of November, 1914.

RICHARDS & HAGA,
Solicitors for Interveners A. W. Priest, et al., and for W. J. Ferris, Receiver of Idaho-Oregon Light & Power Company, and for Intervener A. H. Sundles.

PERKY & CROW,
Solicitors for Defendants, Bankers Trust Company and F. N. B. Close.

SULLIVAN & SULLIVAN,
Solicitors for Plaintiffs, State Bank of Chicago.
J. L. McCLEAR,
Solicitor for Intervener United States of America.

JESS HAWLEY,

H. R. WALDO,

Solicitors for Interveners, Idaho Power & Light
Company and General Electric Company.

C. S. HUNTER,

Solicitors for Intervener Westinghouse Electric &
Manufacturing Company.

WOOD & DRISCOLL,

Solicitors for Intervener, American Steel & Wire
Company.

(Endorsed): Filed Nov. 2, 1914. A. L. Rich-
ardson, Clerk.

IN EQUITY NO. 444.—BOND ON APPEAL.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,

Plaintiff,

v.

IDAHO-OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY, and F. N. B.
CLOSE,

Defendants,

and

A. W. PRIEST, et al.,

Interveners.

KNOW ALL MEN BY THESE PRESENTS, That
we, Idaho Railway, Light & Power Company, and
O. G. F. Markhus, as Receiver of Idaho Railway,

Light & Power Company, as Principals, and American Surety Company of New York, as Surety, acknowledge ourselves to be jointly indebted to plaintiff, State Bank of Chicago; defendants, Bankers Trust Company and F. N. B. Close; Interveners, A. W. Priest, William H. Forster, H. D. Miles, Edward J. Muller, George E. Fisher and W. D. Willard, personally, and as a bondholders committee, W. J. Ferris, as Receiver of Idaho-Oregon Light & Power Company, and to United States of America, Idaho Power & Light Company, General Electric Company, Westinghouse Electric & Manufacturing Company, A. H. Sundles and American Steel & Wire Company, interveners in said cause, all being appellees herein, and to each of said appellees in the sum of Fifty Thousand Dollars (\$50,000.00), conditioned that,

WHEREAS, on the 19th day of September, 1913, in the District Court of the United States for the District of Idaho, Southern Division, in a suit pending in that Court wherein State Bank of Chicago was plaintiff, Idaho-Oregon Light & Power Company, Bankers Trust Company and F. N. B. Close were defendants, and the remaining appellees above mentioned (except said W. J. Ferris) were interveners and said W. J. Ferris was Receiver of defendant, Idaho-Oregon Light & Power Company, which suit was numbered on the Equity Docket as Number 444, a decree was made and entered on the said Bill in Intervention of A. W. Priest, et al., individually and as a bondholders committee, against the said Idaho-Oregon Light & Power Company, Idaho Railway,

Light & Power Company, and O. G. F. Markhus, as Receiver of Idaho Railway, Light & Power Company, respondents to said Bill in Intervention, and the said respondents, on the 2d day of November, 1914, having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the said decree, and a citation directed to the said appellees above mentioned, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, in said Circuit, within thirty days from the date of said citation.

Now, if the said Idaho-Oregon Light & Power Company, Idaho Railway, Light & Power Company, and O. G. F. Markhus, as Receiver of said Idaho Railway, Light & Power Company, shall prosecute their said appeal to effect, and answer all damages and costs if they fail to make their said plea good then the above obligation to be void else to remain in full force and virtue.

IN WITNESS WHEREOF, the said Idaho Railway, Light & Power Company has caused these presents to be executed by its proper corporate officers, and the said O. G. F. Markhus, as Receiver of said Idaho Railway, Light & Power Company has subscribed his hand hereto, all as Principals, and the said American Surety Company of New York, has caused its name to be subscribed and its corporate seal to be affixed by its attorney in fact thereunto

duly authorized by its Board of Directors, this 2d day of November, 1914.

IDAHO RAILWAY, LIGHT & POWER COMPANY.

By H. F. DICKE,

Second Vice President.

Attest:

JOHN F. MACLANE,

Asst. Secretary. (SEAL)

O. G. F. MARKHUS,

As Receiver of Idaho Railway, Light & Power Company.

(SEAL)

AMERICAN SURETY COMPANY OF NEW YORK.

By BRADLEY SHEPPARD (Seal)

Resident Vice President.

CHAS. M. KAHN (Seal)

Resident Asst. Secretary.

The form of the foregoing bond and the sufficiency of sureties is approved this 2nd day of November, 1914.

FRANK S. DIETRICH,

District Judge.

(Endorsed): Filed Nov. 3, 1914. A. L. Richardson, Clerk.

IN EQUITY NO. 444—STIPULATION AS TO
RECORD ON APPEAL.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,
Plaintiff,
v.
IDAHO-OREGON LIGHT & POWER COMPANY,
et al.,
Defendants,
And
A. W. PRIEST, et al.,
Interveners.

It is Stipulated between the solicitors of record of the respective parties hereto as follows:

That original bill was filed in the above entitled cause on July 7, 1913, by the State Bank of Chicago, a corporation duly organized and existing under the laws of the State of Illinois, and a citizen of the said state, and a resident of the Northern district thereof, having its principal place of business in the City of Chicago, County of Cook, State of Illinois, against Idaho-Oregon Light & Power Company, a corporation organized and existing under the laws of the State of Maine, and a citizen of said state, doing business in the states of Idaho and Oregon under and by virtue of its compliance with the laws of said states, said business consisting primarily in the ownership and operation of hydro-electric power plants, stations, sub-stations, transmission and distribution lines in Ada, Boise, Canyon and Washing-

ton counties in the State of Idaho, and Malheur and Baker counties, in the State of Oregon; and the Bankers Trust Company, a corporation organized and existing under the laws of the State of New York, a citizen of said State and a resident of the City of New York in the Southern district of said state; and F. N. B. Close, a citizen of the State of New Jersey. That the suit is and was a suit in equity between citizens of different states, and that the amount in controversy therein exceeds the sum of \$3,000.00 exclusive of interests and costs.

That the bill was one to foreclose a mortgage upon properties of defendant, Idaho-Oregon Light & Power Company, consisting of an hydro-electric power plant with transmission lines and distribution systems in the states of Idaho and Oregon, and within the Southern Division of the District of Idaho, and in the District of Oregon, and of an uncompleted power hydro-electric development in course of construction on lands owned by the Company at the Ox Bow Bend of the Snake River in Baker County, Oregon.

That it was alleged in the bill, and is a fact, that the said mortgage was executed and delivered by the Idaho-Oregon Light & Power Company to the State Bank of Chicago, as Trustee, on or about April 1, 1907, to secure an issue of \$7,000,000.00 first and refunding gold bonds of said Power Company, of which it was alleged bonds to the amount of \$3,319,000.00 had been certified and were outstanding. That the defendants, Bankers Trust Company and

F. N. B. Close, were joined as defendants as trustees under a mortgage executed by the Power Company on or about November 21, 1911, to Windsor Trust Company, a corporation and citizen of the State of New York, and Marmaduke Tilden, a citizen of the State of New Jersey, and to their successors in trust and assigns to secure an issue of \$10,000,000.00 consolidated six per cent gold bonds, covering the same properties of the Power Company as the mortgage to the State Bank of Chicago, and junior to such mortgage, containing provisions for refunding of the bonds issued under the said mortgage to the State Bank of Chicago. That it was alleged in the bill, and is a fact, that Windsor Trust Company and Marmaduke Tilden had resigned as such trustees, and defendants Bankers Trust Company and F. N. B. Close were and are their successors in trust. That it was alleged by the bill on information and belief that \$1,800,000.00 par value of bonds had been certified under said consolidated mortgage, and that \$1,770,000.00 of said bonds were outstanding.

That default had been made in the conditions of said mortgage to the plaintiff in that no part of the interest due April 1, 1913, amounting to \$95,345.00, had been paid, and that such default has continued for three months, which, under the terms of the mortgage, was the period of grace allowed for such payment, and decree of foreclosure was prayed for.

Upon this bill a subpoena to the Power Company was issued and served on July 7, 1913, requiring that Company to answer said bill within twenty days

from the date of service, and a warning order was issued to the defendants Bankers Trust Company and F. N. B. Close requiring them to answer said bill on or before the 11th day of August, 1913, which warning order was duly served upon said defendants on the 11th day of July, 1913.

That the defendant, Idaho-Oregon Light & Power Company, filed its answer in said cause on or about August 5th, 1913, wherein and whereby they admitted all the allegations of said bill of complaint save and except in respect to the allegation of Paragraph 4 thereof, as to the number of bonds certified and delivered to the Power Company, certified and outstanding. The answer states "This defendant neither admits nor denies the allegations contained in Paragraph 4 of Plaintiff's complaint, but leaves such allegations to be proved and established by said plaintiff upon the trial hereof." And the answer denied for want of knowledge allegations of the bill that the holders of more than two-thirds of the bonds secured by mortgage to the plaintiff had requested the plaintiff to declare the bonds due and payable. The Bankers Trust Company and F. N. B. Close filed their answer on August 9th, 1913, wherein they confessed certain allegations of the bill, and denied others for want of knowledge.

The cause came on for trial before the Court by consent of all parties on August 11, 1913, and an informal notice of proposed application by A. W. Priest and others to intervene having been received by the Court, the cause was continued after the evi-

dence was closed until the 14th day of August, 1913, on which day petition for leave to intervene was filed, and the cause was continued until August 20, 1913, when decree of foreclosure was entered. By said decree it was adjudged as follows:

"FIRST: That bonds to the amount of \$3,319,000, were duly certified and issued under the mortgage, copy of which is attached to the Bill of Complaint herein as Exhibit "A," which is herein called the First and Refunding Mortgage, of the Idaho-Oregon Light & Power Company, hereinafter called the Power Company, and are now outstanding, of which 2,474,000 bore interest at the rate of 6% per annum and 845,000 bore interest at the rate of 5% per annum. That all of said bonds bearing interest at the rate of 6% per annum had been issued and were outstanding on April 1st 1913; that on said last mentioned date \$738,000.00, of said bonds bearing interest at the rate of 5% per annum had been issued and were outstanding and that \$107,000.00 of said bonds bearing interest at the rate of 5% per annum were issued on the 24th day of April, 1913.

That on April 1st, 1913, default was made in the payment of the interest coupons on all of said bonds then issued and outstanding.

That default has been made in the principal of said bonds and of the accrued interest thereon from April 1st, 1913, to July 2d, 1913, by the declaration of the Trustee under said mortgage acting upon the written request of the holders of more than two-thirds in amount of all of said bonds then issued

and outstanding, which request was made pursuant to the terms of said mortgage.

That the amount of the principal of said bonds and the amount due on said coupons, with interest on the said amounts, to the date of the entry of this decree is \$3,481,247.81 for which said sum the Power Company is personally liable and which is a valid lien upon all and singular the property, real and personal, and all franchises, rights and other assets of said Power Company of whatsoever kind and nature and wheresoever situate, hereinafter in this decree more particularly described, and which said lien is prior to the lien of the consolidated mortgage made by said Power Company to the defendants, Bankers Trust Company and F. N. B. Close, as trustees, under date of November 1, 1910, mentioned in said bill and to the rights of the trustees and the bondholders thereunder, and each of them, and that the equities of this cause are with the plaintiff, and it is entitled to the equitable assistance of this Court and to the relief prayed for in its said bill of complaint herein, to-wit, the payment of the said sum so due to the said plaintiff, and in default thereof to a sale of said mortgaged and described premises and property, and that the said plaintiff have judgment accordingly against the said defendants Power Company for the said sum hereinbefore mentioned.

SECOND: That the said lien of the plaintiff herein adjudged and any sale made under this decree to satisfy said lien are subject to all taxes, assessments or other prior liens, and, more particu-

larly to that certain mortgage executed by the Boise-Payette River Electric Power Company to the Mercantile Trust Company (now old Colony Trust Company) of Boston, Massachusetts, on the 1st day of April, 1901, for \$500,000.00, under which there are issued and outstanding bonds to the amount of \$485,000.00, insofar as the said mortgage may be by its terms and in law or in equity a lien upon any of the premises subject to the said first and refunding mortgage and herein described; Are further subject to that certain mortgage executed by the Electric Power Company, Limited, to the Idaho Trust and Savings Bank, Limited, of Boise, Idaho, on January 15, 1904, for \$40,000, under which bonds to the extent of \$16,000 are issued and outstanding, insofar as said mortgage may be by its terms and in law or equity a lien on any of said premises; and are further subject to the mortgage executed by the Interstate Light & Water Company to the Hewitt Land Company of Tacoma, Washington, on the 6th day of March, 1907, for \$35,000, under which said mortgage bonds to the extent of \$35,000 are issued and outstanding, insofar as said mortgage may by its terms and in law or equity be a lien on any of said premises; said mortgages and each thereof being underlying mortgages upon separate portions of the premises hereinafter described. It is not intended by this decree and the Court does not hereby find or declare the amount of said liens or any thereof or property subject thereto, but merely recognizes said liens to whatever extent they may be in any subsequent proceeding declared or found to exist, and of

giving notice to purchasers that the said property is sold subject to said liens whatever they may be.

THIRD: That the defendant Power Company pay or cause to be paid within ten days after the entry of this decree to the Clerk of this Court for the plaintiff, State Bank of Chicago, as trustee for the holders of the said unpaid and outstanding first and refunding mortgage bonds and coupons described in and certified under said mortgage to the said plaintiff, State Bank of Chicago, dated April 1, 1907, and mentioned in the bill of complaint, the said sum of \$3,481,247.81 with interest thereon at the rate of seven per centum per annum from the date of this decree to the date of payment and the costs of this suit as the same may be hereinafter taxed. Distribution of any funds paid hereunder shall be subject to further orders of the Court and shall be made only under its direction.

Upon payment of said sum of money within the time herein limited, all interest on the said respective bonds and coupons of the defendant Power Company shall cease and the said defendant Power Company shall be relieved from the operation of the decree of sale herein contained for the payment of said bonds and coupons respectively.

If such payment shall be made by said defendant Power Company, or by any of the other defendants or by any one else for them, within the time aforesaid, then any party to this cause, or the parties so paying the same, may apply to this Court for such further order and directions as to the disposition of

said payment or otherwise as may be deemed just and equitable by the Court.

“FOURTH: Unless the defendant Power Company or some one of the other defendants, or someone else for it or them, within the time aforesaid, shall pay or cause to be paid the sum of money and interest thereon ordered and decreed to be paid by the preceding section of this decree, then Robert M. McCracken be and he hereby is appointed a Special Master in Chancery of this Court, for the purpose of selling the property hereinafter described. * * *

“The Special Master shall receive no bid from anyone offering to bid who shall not have deposited with the Special Master at or before the time of making his bid, as a pledge that he will make good his bid in case of its acceptance, the sum of \$50,000 upon his said bid, either in cash or by duly certified check or checks payable to the order of the Special Master upon some bank or trust company in New York, Chicago or Boise. All deposits received by the Special Master, except that deposited by the bidder whose bid is provisionally accepted by said Master, shall be returned by him at the conclusion of the sale to the bidder or bidders from whom they were received. In case any bidder shall fail to make good his bid upon its provisional acceptance by the Special Master, or shall fail after such acceptance to comply with any order of the Court relating to the terms of the sale, the money or checks deposited by said bidder or purchaser shall be forfeited and such forfeited money

or checks shall be applied towards the payment of the expenses of such sale and any resale which may be ordered, and to such other purposes as the Court may direct. If any sale for which a deposit shall have been made and a bid shall have been provisionally accepted, shall not be confirmed by the Court, such deposit shall be returned to the bidder. The Master shall deposit all moneys or checks received by him at the sale in the First National Bank of Boise, Idaho, to there remain until final order of distribution of the proceeds of the sale, or other order of the court.

“FIFTH: The Court reserves full power, authority and discretion to reject any bid which, in the judgment of the Court, is inadequate or subject to just objection.

“In addition to any cash or the proceeds of any certified check deposited upon any bid at the time of any sale hereunder, which shall be received as a part of the purchase price, there shall also be paid in cash by the purchaser, upon the confirmation of such sale, and from time to time thereafter, such further portions of the purchase price of said property as the Court may direct. The remainder of the purchase price not required to be paid in cash may be paid in cash, or the purchaser of any of said property may satisfy and make good the remainder of his bid, unless otherwise ordered by the Court, in whole or in part, by delivering to said Special Master bonds secured by the first and refunding mortgage to said plaintiff and coupons for the interest on the same

matured and unpaid, so far as they will go towards paying such remainder, which bonds and coupons, unless in negotiable form and payable to bearer, shall be duly endorsed and assigned in blank; all of which bonds and coupons shall be received at such price and value as shall be equivalent to the sum which would be payable on such bonds and coupons, out of the net proceeds of such sale, if such sale were made for money and the whole amount of the purchase price were paid in cash. If there shall be realized on the sale and applied on the purchase price the full amount due on said bonds and coupons, then and in that case the said bonds and coupons, or such of them as are so paid in full, shall be cancelled and retained by the Special Master; but if there shall not be realized on the sale and applied on the purchase price the full amount due on said bonds and coupons, the Special Master shall stamp or write on each bond and coupon the amount which is so applied thereon, and also the amount of the deficiency remaining after such application, and shall file such bonds and coupons with the Clerk of the Court to abide further order of the Court."

The decree continued to fix the terms and conditions of the sale and the disposition of the proceeds thereof, contained provisions for docketing a deficiency judgment, described the property, and further contained the following paragraph:

"NINTH: The Court retains and reserves exclusive power and jurisdiction to make such further orders as are necessary to carry out this decree and

to vest title in the properties subject hereto in the purchaser or purchasers thereof, and to adjudicate claims to and distribute any surplus proceeds arising from the sale after the satisfaction of plaintiff's said claim, and to make any further order in the premises as may be meet and just and as may be required.

“The Court further retains and reserves exclusive jurisdiction to permit petition in intervention to be filed herein at the present or the next ensuing term, with the same effect as if this decree had not been entered, and to vacate this decree upon allowing the filing of any such petition, or to modify the decree in such manner as to afford intervenors any rights which they may establish. The Court further retains jurisdiction to make any order affecting the proceeds of sale or the distribution of such proceeds which may be equitable and just and which may be necessary to adjust any rights or equities which may be properly established in this proceeding by any bondholder or class of bondholders against any other bondholder or class of bondholders, and, to this end, the Court reserves jurisdiction to modify this decree in any manner which may be required. In order to enable the Court to do justice in the premises and to adjudicate rights to and distribute the proceeds of sale in such manner as to do complete justice between all the parties, all proceeds of sale shall be paid into the Clerk of the Court and distributed only under the order of the Court to such bondholders as and in such proportions as the Court may adjudge them entitled, and nothing in this decree contained

shall be deemed or construed to impair or limit the full and complete jurisdiction of the Court as reserved under this paragraph."

That, pursuant to the leave granted by the decree, the intervenors, A. W. Priest and others, filed their petition asking leave to intervene on the 30th day of August, 1913, and on the 15th day of September, 1913, lodged a proposed answer to the Bill of Foreclosure, and on the 17th day of September, 1913, lodged their proposed bill in intervention, making the plaintiff, the defendant Idaho-Oregon Light & Power Company, and the Idaho Railway Light & Power Company, a Maine corporation and citizen of the State of Maine, respondents to said bill, and also presented a motion to vacate the decree as entered on August 20, 1913.

On the 19th day of September, 1913, the Court refused to permit the filing of the proposed answer, denied the motion to vacate the decree of foreclosure, but permitted the bill in intervention to be filed, and ordered issues framed thereon.

That, in due course, and within the time allowed by Court, the respondents to the bill in intervention filed their answers thereto in accordance with the directions contained in the court's order.

That on, to-wit, December 10, 1913, pursuant to motion of the intervenors made on or about October 15, 1913, and pursuant to stipulation of all parties to the cause, filed on December 8, 1913, W. J. Ferris was appointed Receiver of all properties of defendant, Idaho-Oregon Light & Power Company, and is such Receiver.

That the foregoing stipulation is made to obviate any necessity which there might otherwise be to include within the transcript of the record, for use on appeal in the Circuit Court of Appeals for the Ninth Circuit in this cause, the original bill of complaint, answers, decree, or petitions in intervention, (other than the bill in intervention upon which the issues were framed), and it is stipulated that such papers shall not now be required nor deemed necessary for the disposition of the issues raised by such appeal, but that, if the said Circuit Court of Appeals should of its own motion determine any of such papers or files to be necessary, or if either party should hereafter desire any additional paper certified to the said Court, the same may be certified up to said Court upon such determination and made a part of the record on appeal at the expense, in the first instance, of the appellants. And it is further stipulated that the following shall constitute all the papers now deemed necessary to be included in the transcript of the record on appeal herein, and this stipulation shall serve as praecipe to the Clerk for the inclusion of such papers in such transcript, to-wit:

Bill in Intervention of A. W. Priest, et al., filed September 19th, 1913, with amendments thereto.

Order of Court dated, September 19, 1913, framing issues on such bill.

Answer of defendant Idaho-Oregon Light & Power Company, filed September 30, 1913.

Answer of Idaho Railway Light & Power Company, filed October 7th, 1913.

Answer of State Bank of Chicago, filed September 30th, 1913.

Decision of Court filed August 24, 1914.

Supplemental decision filed September 18, 1914.

Judgment or decree on bill in intervention, entered September 19th, 1914.

Statement of evidence under Equity Rule 75.

Petition for appeal and order allowing same.

Assignment of errors.

Bond on appeal.

Citation on appeal.

All papers filed in perfecting the cross-appeal of interveners A. W. Priest, et al.

Copy of this stipulation.

Clerk's return to Record and certificate to transcript.

It is further stipulated and agreed that upon any cross appeal taken from the decree on Bill in Intervention herein mentioned by intervenors A. W. Priest, and others, respondents in this appeal, prior to the return of the record herein made, that the Clerk may include the papers on said cross-appeal in the transcript with these papers certifying separately the expense of the papers upon such cross appeal, that the papers herein mentioned and referred to, and included in the transcript pursuant to the foregoing portion of this stipulation, shall be deemed a part of the record upon the cross appeal of said intervenors so taken, and need not be separately referred to nor included in the transcript upon said cross appeal, and that the statement of evidence

herein contained shall be equally available to said intervenors upon said cross appeal as upon the original appeal, and shall be considered together with any additional statement of the evidence or errors assigned by such intervenors. That the said intervenors upon said cross appeal need only include in the record so made by them any additional statement of evidence so prepared by them and settled by the Court, assignment of errors, petition for appeal and bond on appeal, citation on such appeal being waived by these appellants.

That it is further stipulated that the Circuit Court of Appeals may, if conformable to its rules and practice, docket both the appeal and cross appeal as a single case, and both said appeal and cross appeal may be presented, argued and submitted as such.

Dated, Nov. 3, 1914.

ALFRED A. FRASER,
CAVANAH, BLAKE & MACLANE,
Solicitors for Respondents in Court below, appellants
on appeal.

JOS. CUMMINS and
RICHARDS & HAGA,
Solicitors for intervenors in Court below, respondents on appeal.

C. S. HUNTER and
PERKY & CROW,
HAWLEY, PUCKETT & HAWLEY,
WOOD & DRISCOLL,
J. L. McCLEAR, U. S. Atty.,
SULLIVAN & SULLIVAN,
Solicitors for other respondents on appeal.

IN EQUITY NO. 444—PETITION OF A. W. PRIEST, ET AL., INTERVENERS, FOR APPEAL, AND ORDER ALLOWING SAME.

In the District Court of the United States for the District of Idaho, Southern Division.

STATE BANK OF CHICAGO, Trustee,

Plaintiff,

vs.

IDAHO-OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY and F. N. B. CLOSE,

Defendants,

And

A. W. PRIEST, et al.,

Interveners.

AND NOW COME A. W. Priest, W. D. Willard, Wm. H. Forster, H. D. Miles, Edward J. Muller, George E. Fisher, D. M. Lord, John R. Allen, W. O. Carrier, Allen Hollis, Charles L. Parmelee and Charles M. Smith, interveners, and being a Protective Committee for the holders of the First and Refunding Bonds of the Idaho-Oregon Light & Power Company, and conceiving themselves aggrieved by the decree made and entered on said bill in intervention by the above entitled court on the 19th day of September, A. D., 1914, do hereby appeal from said order and decree so made and entered, as aforesaid, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith.

And said interveners pray that this their appeal may be allowed and that Citation issue, as provided

by law, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that the appeal of these interveners may be taken and considered in the nature of a cross-appeal to the appeal heretofore taken herein by the defendants Idaho-Oregon Light & Power Company, Idaho Railway, Light & Power Company and O. G. F. Markhus, as Receiver of said Idaho Railway, Light & Power Company.

JOSEPH CUMMINS,

Residence: Chicago, Illinois.

RICHARDS & HAGA,

Residence: Boise, Idaho, Solicitors for Intervenors.

ORDER ALLOWING CROSS-APPEAL.

This day came the interveners, A. W. Priest, et al., by their solicitors, and presented their petition for a cross-appeal and an assignment of errors accompanying the same, which petition, upon consideration of the court, is hereby allowed; and the court allows a cross-appeal on the part of said interveners to the United States Circuit Court of Appeals for the Ninth Circuit, upon the filing of a bond in the sum of Five Hundred Dollars (\$500.00), with good and sufficient security to be approved by the Court.

FRANK S. DIETRICH,

District Judge.

Dated, November 3rd, 1914.

(Endorsed:) Filed Nov. 3, 1914. A. L. Richardson, Clerk.

IN EQUITY NO. 444—ASSIGNMENT OF
ERRORS.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,
Plaintiff,

vs.

IDAHO-OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY and F. N. B.
CLOSE,

Defendants,

And

A. W. PRIEST, et al.,

Interveners.

AND NOW COME the Interveners, A. W. Priest, W. D. Willard, Wm. H. Forster, H. D. Miles, Edward J. Muller, George E. Fisher, D. M. Lord, John R. Allen, W. O. Carrier, Allen Hollis, Charles L. Parmelee and Charles M. Smith, constituting a Protective Committee of the holders of the First and Refunding Bonds of the Idaho-Oregon Light & Power Company, and having prayed for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree entered on said bill in intervention of A. W. Priest and others, in said cause on the 19th day of September, 1914, say that the said decree is erroneous and unjust to the said interveners and appellants, and to each of them, and to the holders of the First and Refunding bonds of the said Idaho-Oregon Light & Power Company, and particularly in this:

I.

Because the said court erred in holding and deciding that the said Idaho Railway, Light & Power Company and O. G. F. Markhus, as its Receiver, should be recognized as having an equity in the 718 bonds mentioned in said decree corresponding to the consideration it had paid out, and of which the Idaho-Oregon Light & Power Company received benefit.

II.

Because the said court erred in holding and deciding that the said 718 bonds should not be returned or cancelled or annulled until there had been a restoration by the Idaho-Oregon Light & Power Company, or its Receiver, of what said Company had received under the contracts or by virtue of the transactions annulled or set aside by the court in its said decree, and under or by virtue of which the said Idaho Railway, Light & Power Company received the said 718 bonds.

III.

Because the said court erred in holding and deciding that the moneys actually advanced to the Idaho-Oregon Light & Power Company by the Idaho Railway, Light & Power Company under the contract of September 25th, 1912, should be charged against the said bonds after deducting the \$140,000.00 due the Idaho-Oregon Light & Power Company under the contract of September 19th, 1911.

IV.

Because the said court erred in holding and deciding that the Idaho Railway, Light & Power Com-

pany and its Receiver, O. G. F. Markhus, were entitled to hold the said 718 bonds, or any of them, as security for any money paid, or claimed to have been paid or advanced, to the Idaho-Oregon Light & Power Company under any contract or agreement whatsoever.

V.

Because the said court erred in not holding and deciding that the said 718 bonds, and each and every of them, should be forthwith returned by the Idaho Railway, Light & Power Company and its said Receiver to the Idaho-Oregon Light & Power Company, or its Receiver, without requiring any sum whatsoever to be paid to said Idaho Railway, Light & Power Company, or its Receiver.

VI.

Because the said court erred in holding and deciding that the said Idaho Railway, Light & Power Company and its said Receiver had any right or claim whatsoever in or to the said 718 bonds.

VII.

Because the said court erred in admitting in evidence what purports to be a copy of the Minutes of the meeting of the Executive Committee of the Idaho-Oregon Light & Power Company, held in the Chase National Bank December 27th 1912, the same being marked "Respondents' Exhibit B Re 718 Bonds," and to the admission of which counsel for these interveners duly objected; and to the ruling of the court admitting the same, counsel duly excepted,

and still except, and which exception was by the court allowed.

VIII.

Because the said court erred in denying the motion of counsel for these interveners to strike from the record said alleged minutes of the meeting of the Executive Committee of December 27th, 1912, to which ruling of the court counsel for interveners duly excepted, and still except, which exception was allowed by the court.

IX.

Because the said court erred in sustaining the objection to the following offer of evidence made by counsel for these interveners: "MR. CUMMINS. Now, I wish to offer to prove that the property in question was advertised for sale on December 1st, 1913; that theretofore a proposal to bid not less than \$1,500,000 for the property, if the property were offered not later than December 15, had been made in writing; that no bid was in fact made on December 1st, 1913; that the sale was continued to March 16th, 1914, and that on that date there appeared at the time and place named for such sale, a bidder representing or claiming to represent the Railway Company or the interests connected therewith, who offered \$1,000,000 for the property; that the Receiver of the Idaho Railway, Light & Power Company was represented there by counsel, and, as a bondholder of the Idaho-Oregon Company, urged the acceptance of the bid. I am making that offer for the purpose

of threshing out the question of its admissibility." To which offer objection was made by counsel for the Idaho Railway, Light & Power Company and its Receiver, which objection was sustained by the court; to which ruling of the court counsel for these interveners duly excepted, and still except, and which exception was allowed by the court.

X.

Because the said court erred in not admitting in evidence what is known as the Circular of the New York Committee of March 26th, 1913, and the proposed Bondholders' agreement of May 1st, 1913, and the circular of the New York Committee, bearing date May 1st, 1913, relative to the plan of reorganization proposed by the New York Committee, the same being, respectively, Exhibits "A," "B" and "C" attached to the answer of the State Bank of Chicago, Trustee, to the bill in intervention of these interveners; and to the ruling of the court excluding the same, counsel for interveners duly excepted, and still except, and which exception was allowed by the court.

XI.

Because the said court erred in sustaining the objection of counsel for the Idaho Railway, Light & Power Company and its Receiver to that portion of the deposition of Samuel L. Fuller, commencing with the question, "Q. What efforts did the New York Committee ever make after putting out the plan of May 1st, 1913, to obtain the assent of the Bondholders to that plan?" On page 131 of said deposition,

and extending to and stopping just before the last question on page 133 of said deposition; (the evidence so excluded being set out at length in the supplemental statement settled and allowed by the court herein under Equity Rule 75). To the ruling of the court excluding such evidence, counsel for these interveners duly excepted, and still except, which exception was allowed by the court.

XII.

Because the said court erred in sustaining the objection of counsel for the Idaho Railway, Light & Power Company and its Receiver to that part of the deposition of Samuel L. Fuller, commencing with the question, "Q. At the invitation of yourself, as Chairman of the New York Committee, a conference was held in your office in New York in April, 1913, with reference to the assembling of these bonds in the hands of the New York Committee, was there not?" on page 126 of the deposition of said Samuel L. Fuller and extending to the last question on page 129 of said deposition, (the evidence so excluded being set out at length in the supplemental statement settled and allowed herein under Equity Rule 75.) To the ruling of the court excluding such evidence counsel for these interveners duly excepted, and still except, and which exception was allowed by the court.

WHEREFORE, these interveners, hereinbefore named, pray, that said decree be modified to the extent of requiring the said Idaho Railway, Light & Power Company and its Receiver, O. G. F. Markhus

to forthwith deliver and turn over to the said Idaho-Oregon Light & Power Company and its Receiver the said 718 bonds, and that the said Idaho-Oregon Light & Power Company and its said Receiver be held entitled to the delivery and possession of said bonds without first making the payment required under the decree of the said District Court, and for such other relief as may be just and proper.

JOSEPH CUMMINS,

Residence: Chicago, Illinois.

RICHARDS & HAGA,

Residence: Boise, Idaho. Solicitors for Interveners,
A. W. Priest, et al.

(Endorsed:) Filed Nov. 3, 1914. A. L. Richardson, Clerk.

IN EQUITY NO. 444—BOND ON APPEAL.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,

Plaintiff,

vs.

IDAHO-OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY and F. N. B.
CLOSE,

Defendants,

And

A. W. PRIEST, et al.,

Interveners.

KNOW ALL MEN BY THESE PRESENTS, That we, A. W. Priest, W. D. Willard, Wm. H. Forster, H. D. Miles, Edward J. Muller, George E. Fisher, D. M. Lord, John R. Allen, W. O. Carrier, Allen Hollis, Charles L. Parmelee and Charles M. Smith, interveners, in the above entitled cause and constituting a Protective Committee for the holders of the First and Refunding Bonds of the Idaho-Oregon Light & Power Company, as Principals in this obligation, and the Boise Title and Trust Company, a corporation, with its principal place of business at Boise, Idaho, as Surety, are held and firmly bound unto the Idaho-Oregon Light & Power Company, Idaho Railway, Light & Power Company, O. G. F. Markhus as Receiver of said Idaho Railway, Light & Power Company, State Bank of Chicago, Trustee, and all parties to said cause affected by said appeal, in the sum of Five Hundred Dollars (\$500.00), for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 3rd day of November, 1914.

The condition of this obligation is such, that,

WHEREAS, the above named A. W. Priest, et al., interveners and appellants, have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to modify an order and decree made and entered in the above entitled suit in the

District Court of the United States for the District of Idaho, Southern Division, on the 19th day of September, A. D., 1914.

NOW, THEREFORE, if the above named interveners and appellants, A. W. Priest, et al., shall prosecute their said appeal to effect and answer all costs, if they shall fail to make their said plea good, then the above obligation shall be void. Otherwise, the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF, the said Principals have caused their names to be hereunto subscribed by Oliver O. Haga, one of their solicitors, and the said Boise Title and Trust Company, as Surety, has caused its name to be hereunto subscribed by its duly authorized officers, and its corporate seal affixed, the day and year first above written.

A. W. PRIEST,
WM. H. FORSTER,
EDWARD J. MULLER,
D. M. LORD,
W. O. CARRIER,
CHARLES L. PARMELEE,
W. D. WILLARD,
H. D. MILES,
GEORGE E. FISHER,
JOHN R. ALLEN,
ALLEN HOLLIS,
CHARLES M. SMITH,

By OLIVER O. HAGA,
Their Solicitor.

BOISE TITLE AND TRUST COMPANY,

By S. H. HAYS,

(SEAL)

President.

Attest:

W. J. ABBS,

Secretary.

Approved November 3rd, 1914.

FRANK S. DIETRICH,

District Judge.

(Endorsed:) Filed November 3, 1914. A. L.
Richardson, Clerk.

IN EQUITY NO. 444.—PRAECIPE FOR TRANSCRIPT ON CROSS-APPEAL OF A. W. PRIEST,
ET AL., INTERVENERS.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,

Plaintiff,

vs.

IDAHO-OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY and F. N. B.
CLOSE,

Defendants,

And

A. W. PRIEST, et al.,

Intervenors.

TO THE CLERK:

You are hereby requested to include in the transcript ordered on the appeal of the Idaho Railway,

Light & Power Company and its Receiver the papers filed in perfecting the appeal of A. W. Priest, et al., interveners, viz:

- (a) Petition for appeal and order allowing same.
- (b) Assignment of Errors.
- (c) Bond on Appeal.
- (d) Citation.

These papers are provided for in the stipulation heretofore filed, relative to the record on appeal. The record on the cross-appeal should, as aforesaid, be a part of the record on the original appeal of the Idaho Railway, Light & Power Company and its Receiver, and you may deliver the same to the solicitors for said Company, who are arranging for the printing and filing of the same.

Respectfully,

JOSEPH CUMMINS
RICHARDS & HAGA

Solicitors for A. W. Priest, et al., Intervenors and
Cross-Appellants.

Dated November 4, 1914.

(Endorsed:) Filed Nov. 5, 1914. A. L. Richardson, Clerk, by E. B. Yarrington, Deputy.

IN EQUITY NO. 444.—CITATION.

*District Court of the United States, for the District
of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,
Plaintiff,

v.

IDAHO-OREGON LIGHT & POWER CO., BANK-
ERS TRUST COMPANY and F. N. B. CLOSE,
Defendants,

And

A. W. PRIEST, et al.,
Interveners.

UNITED STATES OF AMERICA— ss.

The President of the United States to State Bank of Chicago, Bankers Trust Company, and F. N. B. Close; A. W. Priest, William H. Foster, H. D. Miles, Edward J. Muller, George E. Fisher and W. D. Willard, personally, and as a bondholders committee; W. J. Ferris as Receiver Idaho-Oregon Light & Power Company; and to the United States of America; Idaho Power & Light Company, General Electric Company, Westinghouse Electric & Manufacturing Company, A. H. Sundles and American Steel & Wire Company;

GREETING:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to

an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein the said State Bank of Chicago is plaintiff, Idaho-Oregon Light & Power Company, Bankers Trust Company and F. N. B. Close are defendants, W. J. Ferris is Receiver of Idaho-Oregon Light & Power Company, and the remaining parties above mentioned are interveners, and wherein you, the parties first above mentioned, are all appellees, and the said Idaho-Oregon Light & Power Company, Idaho Railway Light & Power Company, and O. G. F. Markhus, as Receiver of Idaho Railway Light & Power Company, are respondents to the Bill in Intervention of said A. W. Priest, et al., and are appellants, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States of America this 2nd day of November, A. D., 1914, and of the independence of the United States the one-hundred thirty-ninth year.

FRANK S. DIETRICH,
United States District Judge for the District of
Idaho.

Attest:

A. L. RICHARDSON,
Clerk.

(SEAL)

Due service of the foregoing citation and receipt of copy thereof admitted this 2nd day of November, 1914.

RICHARDS & HAGA,

Solicitors for Intervenor A. W. Priest, et al., and for W. J. Ferris, Receiver Idaho-Oregon Light & Power Co., and for Intervenor A. H. Sundles.

PERKY & CROW,

Solicitors for defendants Bankers Trust Co., and F. N. B. Close.

SULLIVAN & SULLIVAN,

Solicitors for plaintiff State Bank of Chicago.

J. L. McCLEAR,

Solicitors for Intervenor United States of America.

JESS HAWLEY,

H. R. WALDO,

Solicitors for intervenors Idaho Power & Light Co., and General Electric Company.

C. S. HUNTER,

Solicitors for intervenor, Westinghouse Electric & Manufacturing Company.

WOOD & DRISCOLL,

Solicitors for intervenor, American Steel & Wire Company.

(Endorsed): Filed on return Nov. 2d, 1914. A. L. Richardson, Clerk.

IN EQUITY NO. 444.—CITATION.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,

Plaintiff,

vs.

IDAHO-OREGON LIGHT & POWER COMPANY,
BANKERS TRUST COMPANY and F. N. B.
CLOSE,

Defendants,

And

A. W. PRIEST, et al.,

Interveners.

THE UNITED STATES OF AMERICA—ss.

To IDAHO RAILWAY, LIGHT & POWER COMPANY, O. G. F. MARKHUS, Receiver of Idaho Railway, Light & Power Company, IDAHO-OREGON LIGHT & POWER COMPANY and W. J. FERRIS, Its Receiver, BANKERS TRUST COMPANY and F. N. B. CLOSE, UNITED STATES OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY:

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California,

within thirty (30) days from the date of this Writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, by A. W. Priest, et al., interveners in a cause wherein the said State Bank of Chicago is plaintiff and the Idaho-Oregon Light & Power Company, Bankers Trust Company and F. N. B. Close are defendants, and the remaining parties above mentioned are interveners or respondents, to show cause, if any there be, why the judgment, order or decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Frank S. Dietrich, United States District Judge for the District of Idaho, this 3rd day of November, A. D. 1914, and of the Independence of the United States the one hundred thirty-ninth year.

FRANK S. DIETRICH,
United States District Judge for the District
of Idaho.

(SEAL)

Attest:

A. L. RICHARDSON, Clerk.

By E. B. YARINGTON, Deputy.

(Endorsed:) Filed Nov. 5, 1914. A. L. Richardson, Clerk, by E. B. Yarington, Deputy.

RETURN TO RECORD.

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating to be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

A. L. RICHARDSON,

(Seal)

Clerk.

By E. B. YARINGTON,

Deputy Clerk.

CLERK'S CERTIFICATE.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

STATE BANK OF CHICAGO, Trustee,

Plaintiff,

vs.

IDAHO-OREGON LIGHT & POWER COMPANY,
ET AL.,

Defendants,

and

A. W. PRIEST, ET AL.,

Intervenors.

United States of America,
District of Idaho,—ss.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the foregoing pages numbered from 1 to 536, inclusive, contain true and correct copies of the Bill in Intervention of A. W. Priest, et al.,

filed September 19th, 1913, with amendments thereto; Order of Court dated September 19, 1913, framing issues on such bill; Answer of defendant Idaho-Oregon Light & Power Company, filed Sept. 30, 1913; Answer of Idaho Railway Light & Power Company, filed October 7, 1913; Answer of State Bank of Chicago, filed September 30, 1913; Decision of Court filed August 24, 1914; Supplemental Decision filed September 18, 1914; Judgment or Decree on Bill in Intervention, entered September 19, 1914; Statement of Evidence under Equity Rule 75; Petition for Appeal and order allowing same; Assignment of Errors; Bond on Appeal; Citation on Appeal; Stipulation as to Record on Appeal; all papers filed in perfecting the cross-appeal of Interveners, A. W. Priest, et al., to-wit: Petition for appeal and order allowing same; Assignment of Errors; Bond on Appeal, Citation, Praeipie for Transcript on Cross-appeal of A. W. Priest, et al., Interveners; and Return to Record, in the above entitled cause, which together constitute the transcript of the record herein upon appeal, in accordance with the Stipulation and Praeipie as to Record on Appeal and Cross-Appeal, on file herein, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein on the principal appeal amounts to the sum of \$581.40 and that the same has been paid by the appellant, and that the cost of the record on the cross-appeal amounts to the sum of \$43.30 and that the same has been paid by the cross-appellants.

Witness my hand and the seal of said court affixed
at Boise, Idaho, this 21st day of November, 1914.

A. L. RICHARDSON,

(Seal)

Clerk.

By E. B. YARINGTON,

Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

IDAHO-OREGON LIGHT AND POWER COMPANY, IDAHO RAILWAY, LIGHT & POWER COMPANY and O. G. F. MARKHUS, as Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY,

Appellants,

vs.

STATE BANK OF CHICAGO, BANKERS TRUST COMPANY, F. N. B. CLOSE, A. W. PRIEST, WILLIAM H. FORSTER, H. D. MILES, EDWARD J. MULLER, GEORGE E. FISHER, W. D. WILLARD, Personally and as a Bondholders Committee, W. J. FERRIS, as Receiver of IDAHO-OREGON LIGHT & POWER COMPANY, UNITED STATES OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Appellees.

A. W. PRIEST, W. D. WILLARD, WM. H. FORSTER, H. D. MILES, EDWARD J. MULLER, GEORGE E. FISHER, D. M. LORD, JOHN R. ALLEN, W. O. CARRIER, ALLEN HOLLIS, CHARLES L. PARMELEE and CHARLES M. SMITH, Interveners, and Being a Protective Committee for the Holders of the First and Refunding Bonds of the IDAHO-OREGON LIGHT & POWER COMPANY,

Cross-Appellants,

vs.

IDAHO RAILWAY, LIGHT & POWER COMPANY, O. G. F. MARKHUS, Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY, IDAHO-OREGON LIGHT & POWER COMPANY and W. J. FERRIS, Its Receiver, BANKERS TRUST COMPANY, F. N. B. CLOSE, UNITED STATES OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Cross-Appellees.

BRIEF OF APPELLANTS

CAVANAH, BLAKE & MACLANE,

Reginald A. Graves Solicitors for Appellants.

JOHN F. MACLANE, of Counsel.

Upon Appeal From the United States District Court
for the District of Idaho, Southern Division.

Filed

SYMS-YORK CO., PRINTERS & BINDERS, 2015

FEB 4 - 1915

United States
Circuit Court of Appeals
For the Ninth Circuit.

IDAHO-OREGON LIGHT AND POWER COMPANY, IDAHO RAILWAY, LIGHT & POWER COMPANY and O. G. F. MARKHUS, as Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY,

Appellants,

vs.

STATE BANK OF CHICAGO, BANKERS TRUST COMPANY, F. N. B. CLOSE, A. W. PRIEST, WILLIAM H. FORSTER, H. D. MILES, EDWARD J. MULLER, GEORGE E. FISHER, W. D. WILLARD, Personally and as a Bondholders Committee, W. J. FERRIS, as Receiver of IDAHO-OREGON LIGHT & POWER COMPANY, UNITED STATES OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Appellees.

A. W. PRIEST, W. D. WILLARD, WM. H. FORSTER, H. D. MILES, EDWARD J. MULLER, GEORGE E. FISHER, D. M. LORD, JOHN R. ALLEN, W. O. CARRIER, ALLEN HOLLIS, CHARLES L. PARMELEE and CHARLES M. SMITH, Interveners, and Being a Protective Committee for the Holders of the First and Refunding Bonds of the IDAHO-OREGON LIGHT & POWER COMPANY,

Cross-Appellants,

vs.

IDAHO RAILWAY, LIGHT & POWER COMPANY, O. G. F. MARKHUS, Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY, IDAHO-OREGON LIGHT & POWER COMPANY and W. J. FERRIS, Its Receiver, BANKERS TRUST COMPANY, F. N. B. CLOSE, UNITED STATES OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Cross-Appellees.

BRIEF OF APPELLANTS

CAVANAH, BLAKE & MACLANE,
& Alfred A. Gross Solicitors for Appellants.
JOHN F. MACLANE, of Counsel.

*Upon Appeal From the United States District Court
for the District of Idaho, Southern Division.*

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IDAHO-OREGON LIGHT & POWER COMPANY,
et al.,

Appellants,

v.

STATE BANK OF CHICAGO, et al.,

Respondents.

BRIEF OF APPELLANTS

STATEMENT OF THE CASE.

This is an appeal from a decree entered by the United States District Court for the District of Idaho, Southern Division, on the 19th day of September, 1914 (see Record, pages 155-164), upon a petition in intervention by A. W. Priest and others, individual bondholders and as a bondholders' committee (Record pp. 5-47), filed in equity suit No. 444, being a suit by the State Bank of Chicago, as Trustee, against the Idaho-Oregon Light & Power Company, and others, to foreclose a mortgage executed by the latter Company securing the bonds held by the interveners and others. (Record pp. 502-503). The decree was in favor of the interveners, and from it this appeal is prosecuted by the defendant Company (being allowed as to it merely *pro forma*) and by Idaho Railway, Light & Power Company and O. G. F. Markhus, its Receiver, who were respondents to the intervening petition (Record pp. 477-478).

To adopt for convenience the nomenclature used in the lower court, the Idaho-Oregon Light & Power Company will be hereinafter referred to as the "Power Company," the Idaho Railway, Light & Power Company will be hereinafter referred to as the "Railway Company," the appellees here may, so far as it is necessary to refer to them, be styled "Intervenors," and as the Receiver of the Idaho Railway, Light & Power Company claims in no other right than that of the Railway Company, he need not be further separately mentioned.

A succinct statement of the formal proceedings of the cause is found in the stipulation on pages 502 to 514 of the Record, which, so far as deemed by the appellants material, is as follows:

"It is stipulated between the solicitors of record of the respective parties hereto as follows:

"That original bill was filed in the above entitled cause on July 7, 1913, by the State Bank of Chicago, a corporation duly organized and existing under the laws of the State of Illinois, and a citizen of the said state, and a resident of the Northern district thereof, having its principal place of business in the City of Chicago, County of Cook, State of Illinois, against Idaho-Oregon Light & Power Company, a corporation organized and existing under the laws of the State of Maine, and a citizen of said state, doing business in the States of Idaho and Oregon under and by virtue of its compliance with the laws of said states, said business consisting primarily in the

ownership and operation of hydro-electric power plants, stations, sub-stations, transmission and distribution lines in Ada, Boise, Canyon and Washington counties in the State of Idaho, and Malheur and Baker counties, in the State of Oregon; and the Bankers Trust Company, a corporation organized and existing under the laws of the State of New York, a citizen of said State and a resident of the City of New York in the Southern district of said state; and F. N. B. Close, a citizen of the State of New Jersey. That the suit is and was a suit in equity between citizens of different states, and that the amount in controversy therein exceeds the sum of \$3,000.00 exclusive of interests and costs.

“That the bill was one to foreclose a mortgage upon properties of defendant, Idaho-Oregon Light & Power Company, consisting of an hydro-electric power plant with transmission lines and distribution systems in the States of Idaho and Oregon, and within the Southern Division of the District of Idaho, and in the District of Oregon, and of an uncompleted power hydro-electric development in course of construction on lands owned by the Company at the Ox Bow Bend of the Snake River in Baker County, Oregon.

“That it was alleged in the bill, and is a fact, that the said mortgage was executed and delivered by the Idaho-Oregon Light & Power Company to the State Bank of Chicago, as Trustee, on or about April 1, 1907, to secure an issue of

\$7,000,000.00 first and refunding gold bonds of said Power Company, of which it was alleged bonds to the amount of \$3,319,000.00 had been certified and were outstanding. That the defendants, Bankers Trust Company and F. N. B. Close, were joined as defendants as trustees under a mortgage executed by the Power Company on or about November 21, 1911, to Windsor Trust Company, a corporation and citizen of the State of New York, and Marmaduke Tilden, a citizen of the State of New Jersey, and to their successors in trust and assigns to secure an issue of \$10,000,000.00 consolidated six per cent gold bonds, covering the same properties of the Power Company as the mortgage to the State Bank of Chicago, and junior to such mortgage, containing provisions for refunding of the bonds issued under the said mortgage to the State Bank of Chicago. That it was alleged in the bill, and is a fact, that Windsor Trust Company and Marmaduke Tilden had resigned as such Trustees, and defendants Bankers Trust Company and F. N. B. Close were and are their successors in trust. That it was alleged by the bill on information and belief that \$1,800,000.00 par value of bonds had been certified under said consolidated mortgage, and that \$1,770,000.00 of said bonds were outstanding.

* * * * *

“The cause came on for trial before the Court by consent of all parties on August 11, 1913, and

an informal notice of proposed application by A. W. Priest and others to intervene having been received by the Court, the cause was continued after the evidence was closed until the 14th day of August, 1913, on which day petition for leave to intervene was filed, and the cause was continued until August 20, 1913, when decree of foreclosure was entered. By said decree it was adjudged as follows:

“ ‘FIRST: That bonds to the amount of \$3,319,000, were duly certified and issued under the mortgage, copy of which is attached to the Bill of Complaint herein as Exhibit “A,” which is herein called the First and Refunding Mortgage, of the Idaho-Oregon Light & Power Company, hereinafter called the Power Company, and are now outstanding, of which \$2,474,000 bore interest at the rate of 6% per annum and \$845,000 bore interest at the rate of 5% per annum. That all of said bonds bearing interest at the rate of 6% per annum had been issued and were outstanding on April 1st, 1913; that on said last mentioned date \$738,000.00 of said bonds bearing interest at the rate of 5% per annum had been issued and were outstanding and that \$107,000.00 of said bonds bearing interest at the rate of 5% per annum were issued on the 24th day of April, 1913.

“ ‘That on April 1st, 1913, default was made in the payment of the interest coupons on all of said bonds then issued and outstanding.

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“ ‘NINTH: The Court retains and reserves exclusive power and jurisdiction to make such further orders as are necessary to carry out this decree and to vest title in the properties subject hereto in the purchaser or purchasers thereof, and to adjudicate claims to and distribute any surplus proceeds arising from the sale after the satisfaction of plaintiff’s said claim, and to make any further order in the premises as may be meet and just and as may be required.

“ ‘The Court further retains and reserves exclusive jurisdiction to permit petition in intervention to be filed herein at the present or the next ensuing term, with the same effect as if this decree had not been entered, and to vacate this decree upon allowing the filing of any such petition, or to modify the decree in such manner as to afford intervenors any rights which they may establish. The Court further retains jurisdiction to make any order affecting the proceeds of sale or the distribution of such proceeds which may be equitable and just and which may be necessary to adjust any rights or equities which may be properly established in this proceeding by any bondholder or class of bondholders against any other bondholder or class of bondholders, and, to this end, the Court reserves jurisdiction to modify this decree in any manner which may be required. In order to enable the Court to do justice in the premises and to adjudicate rights to and distribute the proceeds of sale

in such manner as to do complete justice between all the parties, all proceeds of sale shall be paid into the Clerk of the Court and distributed only under the order of the Court to such bondholders as and in such proportions as the Court may adjudge them entitled, and nothing in this decree contained shall be deemed or construed to impair or limit the full and complete jurisdiction of the Court as reserved under this paragraph.'

"That, pursuant to the leave granted by the decree, the intervenors, A. W. Priest and others, filed their petition asking leave to intervene on the 30th day of August, 1913, and on the 15th day of September, 1913, lodged a proposed answer to the Bill of Foreclosure, and on the 17th day of September, 1913, lodged their proposed bill in intervention, making the plaintiff, the defendant Idaho-Oregon Light & Power Company, and the Idaho Railway Light & Power Company, a Maine corporation and citizen of the State of Maine, respondents to said bill, and also presented a motion to vacate the decree as entered on August 20, 1913.

"On the 19th day of September, 1913, the Court refused to permit the filing of the proposed answer, denied the motion to vacate the decree of foreclosure, but permitted the bill in intervention to be filed, and ordered issues framed thereon.

"That, in due course, and within the time allowed by Court, the respondents to the bill in intervention filed their answers thereto in accord-

ance with the directions contained in the Court's order.

"That on, to-wit, December 10, 1913, pursuant to motion of the intervenors made on or about October 15, 1913, and pursuant to stipulation of all parties to the cause, filed on December 8, 1913, W. J. Ferris was appointed Receiver of all properties of defendant, Idaho-Oregon Light & Power Company, and is such Receiver."

The cause came on regularly for trial in June, 1914, on the issues framed on the Bill in Intervention, and on August 24, 1914, the Court rendered a preliminary decision and on September 18, 1914, a supplemental decision, which decisions are shown on pages 131 to 154 inclusive of the Record, and on September 19th there was filed the decree shown on pages 155 to 164 inclusive, from which this appeal has been taken.

Some particular reference to the pleadings and the decree should be made before discussing the facts, ~~which can more appropriately be done in connection with the argument.~~

The Bill in Intervention is voluminous. After stating the formal proceedings in the principal cause and the status of Interveners as individual bondholders and as a protective committee representing other bondholders, the bill proceeds to set forth the organization of the Power Company, the reputed value of its properties, its advertised financial prospects and its management, and in paragraph V, on page nine, alleged that for the purpose of obtaining

additional money with which to complete its power development, the Ox Bow Plant, it "entered into a contract with Kissel-Kinnicutt & Company, a co-partnership engaged in the banking and brokerage business, and being members of the stock exchange of the City of New York," under which contract they were informed and believed Kissel-Kinnicutt & Company (who may be hereafter referred to for convenience as the "Bankers") were bound to purchase \$1,500,000 of the issue of "Consolidated Bonds," secured by the junior mortgage to the Bankers Trust Company and F. N. B. Close, and that in addition to the purchase of the bonds, the Bankers received a large stock bonus sufficient to give them an equal voting power with the former managers of the Company, the Messrs. Mainland.

It is further alleged (p. 10), that upon acquiring control of the Company, the Bankers caused to be organized the Railway Company, with an authorized capital of \$30,000,000, and executed a mortgage to secure an authorized issue of a like amount of bonds. They then (p. 11) transferred and induced the Messrs. Mainland to transfer their combined holdings in the Power Company, being a total of 77,650 shares out of an authorized issue of 100,000, to the Railway Company; caused persons of their selection to be elected officers and directors of both companies, and effecting a substantial physical consolidation of their properties, the Railway Company having acquired (p. 12) other power properties and electric railroad properties in the same district which the Power Company was serving.

In paragraph VI (pp. 12 to 13), it is alleged in substance that the Railway Company diverted business from the Power Company and threatened the latter with competition in its markets, and generally manipulated the Power Company in the interests of the Railway Company. Paragraph VII (pp. 14 and 15), alleges in substance that the Railway Company was not a profitable enterprise; that it had issued \$6,500,000 of bonds, which its sponsors, the Bankers, were unable to market, and that they therefore devised the plan of foreclosing the mortgage on the Power Company's properties, and, by a proposed reorganization scheme, subordinating the bonds secured by the mortgage to the plaintiff, to those issued by the Railway Company the lien of which would be extended over the properties of the Power Company. Mismanagement of the Power Company by the Railway Company interests is further alleged in paragraphs VIII and IX (pp. 16 to 19), and paragraph X (pp. 19-27) purports to set forth the proposed reorganization scheme of the so-called Railway Interests. The remaining paragraphs contain similar allegations as to the general turpitude of the Railway management and reiterate and amplify the charges of fraud and mismanagement made throughout the bill.

Paragraph XII on pages 28 and 29 is that upon which the issues were framed, and is as follows:

“The interveners further show that the Railway Company was sometime in the early part of 1913 in possession and claiming the ownership of

certain consolidated or second mortgage bonds of the Power Company; that thereupon the Railway Company demanded of the Power Company that it receive back these consolidated or second mortgage bonds and deliver to the Railway Company instead an equal amount of the first mortgage bonds of the Power Company, being a part of the \$3,319,000.00 of bonds alleged to be outstanding and upon which foreclosure is sought in this suit; that the Power Company, being as above shown fully under the control and domination of the Railway Company, necessarily acceded and did accede to this demand, and thereupon delivered and turned over to the Railway Company \$718,000.00 of the said first mortgage bonds, after the Railway Company had collected the November, 1912, interest on the consolidated bonds. The interveners charge that the said consolidated bonds, in view of the alleged deficit in the earnings of the Power Company for the year 1912 and in view of the default and foreclosure then planned and anticipated, had no market value and were to all intents and purposes worthless, and that the said exchange of bonds was wholly without consideration and was, as to the interveners and the Power Company, wrongful and fraudulent, and that the said bonds are not, because of said issue and delivery by the Power Company to the Railway Company, issued and outstanding and valid obligations of the Power Company, but that the same should be by this Court called in and cancelled."

The prayer for relief (pp. 43-46) is for the appointment of a Receiver for the purpose of removing the property of the Power Company from the possession and control of the Railway Company, and to enforce and obtain accountings against persons and corporations who had obtained possession and control of the bonds, moneys and other property of the Power Company, including the collection and recovery of unpaid stock; that creditors be required to present and establish their claims; that if necessary the plants and properties of the Power Company be sold, etc. A supplemental prayer was added (p. 49), that the Court annul and declare illegal and void the 718 bonds obtained by the Railway Company in exchange for consolidated bonds, and that the Railway Company be made defendant to answer those allegations. A tenth clause asks (p. 50) that the decree of foreclosure and sale be vacated and set aside.

The order framing the issues appears on pages 55 to 59 of the Record. By it the Interveners were permitted to appear, and their Bill was filed, and both the Railway and Power Companies were required to answer the allegations respecting the 718 bonds, and subpoena was directed to issue to the Railway Company. The Power Company was required to answer certain other issues, viz: As to the location of 107 bonds, and of another 520 bonds, and also as to an alleged payment of interest on the April 1st, 1914, coupons. The decree, however, was favorable to the Power Company, as to the 107 bonds (Record p. 157), and the other issues mentioned in

the order, were dismissed from the case by stipulation at the opening of the hearing (Record p. 168), leaving only the issue as to the 718 bonds for determination here. None of the issues of fraud and mismanagement were required to be answered and the same were in effect dismissed from consideration (Record p. 167). The order provided (p. 57) that "the failure of any party to answer any averments of the Bill in Intervention not expressly required by this order to be answered shall not be construed as an implied admission that the same are true."

The answers of the Railway and Power Companies as to the 718 bonds, are substantially the same. Quoting from the answer of the Railway Company, after denying the allegations of the Interveners, it is alleged (Record pp. 98-101):

"That on and prior to September 25th, 1912, the defendant Power Company was in need of \$250,000.00 for its general corporate purposes and legitimate capital expenditures; that on and prior to said date, the defendant Power Company applied to the Railway Company for a loan of \$250,000.00 in cash; that the Railway Company was at the time of such application the owner by purchase of consolidated bonds of the Power Company of the face and par value of about \$1,500,000, which said bonds bore interest at the rate of six per cent per annum but were inferior in lien to the said refunding bonds, which said bonds bore interest at the rate of five per cent per annum; that the Power Company represent-

ed at that time that it had certified and in its treasury as free assets, refunding bonds to the amount of \$305,000 and that it was entitled under the terms of its trust deed to a further issue of refunding bonds to reimburse it for expenditures made to an amount in excess of \$500,000. That the Railway Company stipulated as a condition of making said loan to the Power Company that the Power Company should exchange its said first or refunding mortgage bonds then in its treasury or to which it should be entitled, to the extent of \$500,000.00 for a like amount of consolidated bonds held by the Railway Company, and that it should further secure the Railway Company for loans made by it to the extent of \$250,000.00 by a pledge of said refunding bonds in the ratio of two dollars in bonds for one dollar of loan; that these terms were accepted by the Power Company and an agreement for such exchange was made, a copy of which agreement is attached as Exhibit B to the answer of the defendant Power Company, which said exhibit is hereby referred to and by reference made a part hereof. That the Power Company thereupon procured the certification of the bonds to which it was entitled from the plaintiff herein as its Trustee, as hereinbefore stated, and refunding bonds to the extent of about \$440,000 were exchanged by the Power Company for consolidated bonds held by the Railway Company on or about December 27th, 1912, said bonds having been theretofore delivered by the Power Company to the

Railway Company as collateral and the Railway Company accepted consolidated bonds as said collateral in lieu of said refunding bonds.

“2. That on or about the date of said last exchange, to-wit: December 27th, 1912, the Power Company applied to the Railway Company to assist it in a settlement of a controversy with the Bates & Rogers Construction Company, an Illinois corporation, hereinafter called Construction Company, and the Railway Company to assist the Power Company pursuant to said application agreed to deliver fifty shares of its preferred stock and one hundred shares of its common stock to the Construction Company and further agreed to purchase from the Construction Company on demand within a specified period \$25,000 face and par value of the Power Company's consolidated bonds at eighty per centum of the face and par value thereof and interest accrued and unpaid thereon, which said bonds were then delivered by the Power Company to the Construction Company as part of said settlement of controversy. That as consideration for said agreement, on the part of the Railway Company and of its assistance in effecting said settlement, the Power Company agreed to exchange with the Railway Company additional refunding bonds not to exceed \$500,000 face and par value thereof for a like amount of consolidated bonds still held by the Railway Company. A copy of said agreement is annexed to the answer of the de-

fendant Power Company marked Exhibit C and is referred to and by way of reference made part hereof.

“3. That pursuant to said agreements of September 25th and December 27th, 1912, the Railway Company duly performed all the conditions of said agreements by it to be performed and loaned to the Power Company \$250,000 in cash and delivered to the Power Company from time to time, the last delivery being made in January 1913, its consolidated six per cent second mortgage bonds for refunding five per cent first mortgage bonds, which the Power Company delivered to the Railway Company and the Railway Company likewise accepted from the Power Company as collateral for its said loan consolidated bonds in lieu of said refunding bonds to which it was entitled under said agreement of September 25th, 1912. That said agreements, and each of them, have been duly performed and executed and the Railway Company claims to own and does own the said \$718,000 face and par value of first and refunding bonds of the Power Company and is entitled to participate in the distribution of the proceeds of any sale in this cause to the extent thereof.

“4. This Railway Company does not admit any of the allegations of the said bill in intervention not herein denied or referred to, but limits its answer to the matters herein stated on the ground and for the reason solely that it is not

required but is expressly excused from answering the same by said order of September 19th, 1913, pursuant to which this said answer is made."

The agreements referred to in the Railway Company's answer, under which the exchanges of bonds were made, are contained at pages 112 to 123 inclusive of the Record.

The evidence introduced upon the trial was quite voluminous, but the greater part of it was record evidence consisting of exhibits, and the facts, omitting further than to mention points of conflict, may be summarized as follows:

A brief history of the organization of the Power and Railway Companies and the relations between the two, as shown (Record pp. 197, 198) by the testimony of O. G. F. Markhus, is as follows:

"Witness was General Manager of the Power Company from 1907 to and including practically the whole year of 1913. That Company became an operating Company in October 1908. Prior to that time it had commenced construction of the Ox Bow plant, and it then took over the operation of previously existing companies, known as Capital Electric Light, Motor & Gas Company, Boise-Payette Electric Power Company, Electric Power Company, Limited, Interstate Light & Water Company, and became an operating Company or distributor of electric current.

“Kissel, Kinnicutt & Company first became interested in the property or securities of the Power Company in September, 1911, and persons designated by it commenced to participate in the management of the Power Company on December 1, 1911. Prior to that time William & S. Mainland of Oshkosh, Wisconsin, were the general operators of the property; they were replaced by Mr. Watson at the instance of the new interests, represented by Kissel, Kinnicutt & Company, but the Messrs. Mainland still remained directors of the Company and members of its Executive Committee, and Mr. William Mainland continued to be its President.

“The Railway Company was organized in November 1911, and commenced business December 1, 1911, on or about which date it acquired the properties of the Swan Falls Power Company which owned a power plant at Swan Falls on the Snake River and transmission lines into the Silver City District, so-called, serving lines around Silver City and at Dewey and Murphy, and a transmission line from Swan Falls station through Nampa and Caldwell, where it was wholesaling power and from which it retailed power at Middleton; the Dewey Electric Company which distributed light and power to Nampa, the Boise Valley Railway Company, which had a railway system extending from Boise to Nampa, and the Boise & Interurban Railway Company, which had a railway from Boise to

Caldwell, and the Caldwell Power Company, which distributed power at Caldwell, Idaho."

The general situation and relations between the companies and their territory is shown by the map on page 199, which, as shown in the record, is not particularly illuminating, because of the absence of different colored lines to represent the two companies. Generally speaking it may be said that the Railway Company supplied the territory due West and South of Boise, while the Power Company served Boise and the territory North of a line which might be drawn through the Town of Caldwell, the power lines coming in contact near Boise.

Immediately upon its organization in 1907 the Power Company created the mortgage foreclosed in this suit, material parts of which are quoted on the record from pages 383 to 396 inclusive. The mortgage was the usual form of corporate mortgage to secure an issue of bonds of \$7,000,000, the bonds reciting (Record p. 384) "the payment of all of which bonds, with interest as aforesaid, is equally and ratably, and without preference of one bond over another, secured" by the mortgage to plaintiff. Later in the bond followed the clause (pp. 384, 385):

"The holder of this bond shall have no recourse for the payment thereof or of any coupons issued therewith or of the indebtedness thereby evidenced, to any individual liability of any incorporator or any past, present or future stockholder, officer or director of the undersigned, im-

posed by any statute or otherwise or for or on account of anything or act heretofore or hereby done or omitted, all such liability being taken to be waived by such holder at the time of the purchase hereof, and by accepting this bond each successive holder assents to the terms of this provision.

“This bond shall not become obligatory until it shall have been authenticated by the certificate of the said State Bank of Chicago, as Trustee endorsed hereon.”

After the granting clause and the description of the property appears the following (Record p. 386) :

“IN TRUST, HOWEVER, for the equal and proportionate benefit and security of all present and future holders of the bonds and coupons issued and to be issued under and secured by this indenture, and for the enforcement of the payment of said bonds and coupons, when payable, and the performance of and compliance with the covenants and conditions of this indenture, without preference, priority or distinction, as to lien or otherwise, of any one bond over any other bond by reason of priority in the issue or negotiation thereof, so that each and every bond issued and to be issued as aforesaid shall have the same right, lien and privilege under this indenture, and so that the principal and interest of every such bond shall, subject to the terms hereof, be equally and proportion-

ately secured hereby, as if all had been made, executed, delivered and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of this indenture shall take effect from the day of the date hereof, without regard to the date of actual issue, sale or disposition of said bonds, and as though upon the day of such date all of said bonds had been actually issued, sold and delivered to, and were in the hands of innocent holders for value."

By Article 2 the purposes for which the bonds may be used are set forth. (Pages 387-393). Without quoting them in detail it is provided briefly that bonds numbered 1 to 500, inclusive, should be immediately delivered to or upon order of the President of the company. Bonds 2501 to 3050, inclusive, should be set apart for the purpose of retiring outstanding underlying divisional bonds. Bonds 501 to 2500 should be certified and delivered to the trustee from time to time for the purpose of building the Ox Bow Power plant on the Snake River, it being provided that the bonds should only be delivered "in the proportion that the work then done and material then purchased bears to the said \$2,000,000 of said bonds," the purpose being to insure the completion of the plant within the amount limited therefor. The remainder of the bonds, Numbers 3051 to 7000, inclusive, were required to be held by the trustee until certified and delivered by it to the company for one of the following purposes.

“(1) To provide means for the purchase or acquisition of other properties or plants of a kindred character.” (Page 390.)

“(2) For the purpose of retiring bonds or other evidences of indebtedness against properties thus acquired. (Pages 391, 392.)

“(3) For ninety per cent of such amounts as may be after this date actually expended by the said Company in additions, improvements, extensions, enlargements, equipments, or betterments to any of its plants or property now or hereafter acquired.” (Page 393.)

During the course of the trial the following was stipulated. (Record pp. 378, 379.)

1. That the total amount of first mortgage bonds in the treasury of the Idaho-Oregon Light & Power Company on September 25, 1912, plus certifications subsequent to September 25, 1912, and prior to April 1, 1913, was \$718,000, all being five per cent bonds.

2. That the total amount of Idaho-Oregon bonds certified subsequent to April 1, 1913, was \$107,000, five per cent bonds.

3. That the total amount of bonds outstanding certified under the mortgage to the State Bank, the complainant herein, prior to September 25, 1912, was \$2,494,000.

4. That the Idaho-Oregon Company began shortly after its organization the construction of the so-called Ox Bow plant, at the Ox Bow bend of the Snake

River, on the border of Idaho and Oregon, and up to May, 1910, the company had expended, according to its records, approximately \$2,000,000 upon the construction of said Ox Bow plant and the transmission line to connect the same with the company's distributing system. That the company then had legal advice that further issues under the mortgage of the State Bank of Chicago, complainant herein, could not be used for completing the Ox Bow. On September 19, 1911, this plant remained uncompleted, no part of it being in operation, and no power being produced thereat.

It was further stipulated (Record pp. 396-398) :

The requisitions by the Company to the Trustee for the bonds which are included within the 718 bonds now held and claimed by Idaho Railway Light & Power Company and its receiver were for the following numbered bonds which were received by the Company and were made between the dates, and to fund expenditures made by the Idaho-Oregon Light & Power Company shortly preceding those dates, for the purposes stated.

1. Bonds 2501 to 2540 to reimburse the Company for expenditures made in retiring the underlying divisional bonds on the properties formerly belonging to the Electric Power Company, Limited, but at the time of such expenditure and now belonging to the Idaho-Oregon Light & Power Company, and covered by the mortgage to the plaintiff, State Bank of Chicago. Of said bonds the Railway Company holds numbers 2501 to 2514, inclusive, and 2525 to 2534

inclusive, aggregating \$24,000.00, and representing the number of Electric Power Company bonds actually retired, the remaining sixteen of said bonds not having been retired, and the sixteen bonds requisitioned for such retirement not having been used, and not being within the bonds held or claimed by the Railway Company in this case. These bonds were requisitioned and received by the Company during the month of April, 1909.

2. Bonds numbered 3051 to 3288, inclusive, requisitioned and received by the Company between April 1, 1908, and August 20, 1910, to reimburse the Company for 90 per cent of such amounts as had actually been expended by the Company since, to-wit, January 1, 1908, in extensions, enlargements, equipments or betterments to its plants and property, as provided in paragraph 3 of Article 2 of the mortgage.

3. Bonds No. 3289 to 3341 requisitioned and received by the Company between September 1, 1909, and November 1, 1910, to reimburse the Company for expenditures made in the purchase by it during said period or prior thereto, and subsequent to January 1, 1908, of (a) The Emmett lighting plant and distributing system, (b) The Payette lighting plant and distributing system, (c) The Interstate Lighting plant at Ontario, Oregon, all of said plants then and now belonging to said company.

In connection with these expenditures and the bonds issued to reimburse the company therefor the

following statement by the company's manager is of importance: (Record p. 432.)

During the years 1908 to 1912 inclusive the Power Company had no other source of income of revenue from which expenditures could be made in retiring underlying bonds, purchasing properties or making additions, enlargements, etc., to its plants and properties than the earnings and proceeds of second mortgage bonds, where the expenditures were not originally made in the first instance from the proceeds of the first mortgage bonds.

What has gone before is regarded by appellants as so material to their case that it has been inserted for the convenience of the Court at length.

Turning now to the facts having immediate bearing on the transaction in controversy we find that on the 19th day of September, 1911, the Power Company, its managers and principal stockholders, the Messrs Mainland and the Bankers Kissel Kinni-

mon form of underwriting contract, and, in view of the large commitment involved and the speculative

inclusive, aggregating \$24,000.00, and representing the number of Electric Power Company bonds actually retired, the remaining sixteen of said bonds not having been retired, and the sixteen bonds requisitioned for such retirement not having been used, and not being within the bonds held or claimed by the Railway Company in this case. These bonds were requisitioned and received by the Company during the month of April, 1909.

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3. Bonds No. 3289 to 3341 requisitioned and re-

4. Bonds No. 3342 to 3754 requisitioned September 25, 1912, and received by the Company during December, 1912, and January, 1913, to reimburse the company for ninety per cent of expenditures made under said Clause 3 of Article 2 of the mortgage for ninety per cent of such amounts as had been expended between July 1, 1910, and July 31, 1912, in additions, improvements, extensions, etc., to the Company's plants and properties.

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What has gone before is regarded by appellants as so material to their case that it has been inserted for the convenience of the Court at length.

Turning now to the facts having immediate bearing on the transaction in controversy we find that on the 19th day of September, 1911, the Power Company, its managers and principal stockholders, the Messrs. Mainland, and the Bankers, Kissel, Kinnicut & Company, entered into a contract, (Record pp. 168-193), by which the Bankers agreed, under certain conditions, to purchase \$1,500,000 face value of the consolidated, or, as they are generally referred to in the ^{record} mortgage, second mortgage bonds of the Power Company, at the price of eighty dollars per bond, and received as consideration therefor a large quantity of stock of the Power Company so as to give them an equal voice with the Mainlands in its management and control. The contract was a very common form of underwriting contract, and, in view of the large commitment involved and the speculative

character of the securities purchased, it gave the Bankers large control of the financial policies of the Power Company although such control was really only equal to that of the Messrs. Mainland. The contract is also of interest in that it contemplated the independent purchase of the Swan Falls Power properties and contains provisions for the organization of a new Company to hold the title to those properties, and for the consolidation of the interests of the two companies. (Pages 182-187).

The manner in which the Bankers became introduced to the properties of the Power Company and interested in them is briefly explained on pages 194 and 195 of the Record, and, on the latter page, after stating that a syndicate was formed to take over the Bankers' holdings in the Power Company and in other properties which they had acquired, and which later became the properties of the Railway Company, Mr. Fuller, the syndicate manager, stated:

"The syndicate found itself owning a large interest in the Idaho-Oregon Company, and also, for the benefit of the Idaho-Oregon Company and for the benefit of the entire situation it had built up here an absolutely independent and self-sustaining and what was going to be a profitable enterprise, consisting of a power plant, and a large interurban and urban street railway system, and they therefore, as the Idaho-Oregon Company was in no position financially to take over the properties of the Railway Company, and the syndicate had two interests, thought it would

be wise to turn over all of their interests in the Idaho-Oregon Company to the Idaho Railway Company, which they did, taking securities of the same class from the Idaho Railway for securities of the Idaho-Oregon Company, which they turned in to the Railway Company. In order to protect the stockholders of the Idaho-Oregon Company who had a security of questionable value in the stock of the Idaho-Oregon Company, opportunity was voluntarily given them by the Idaho Railway Company to exchange their securities in the Idaho-Oregon Company for securities in the Idaho Railway Company. A circular was sent out to all the stockholders of record, and a very large proportion of the stockholders so exchanged their stock; in that way all of our interests, our stock interests were in the Idaho Railway Company, which in turn controlled the Idaho-Oregon Company."

The syndicate operations continued for about a year during which the Railway Company was in its formative period, and acquired the properties hereinbefore mentioned. The latter part of August or early in September, 1912, it clearly appears that for various reasons the enterprise of the Power Company, at least, and, the interveners will contend (which we do not think was true, and if true we regard as immaterial) the Railway Company, was not prospering as had been anticipated. The reasons for this may be the occasion of comment and dispute during the argument. It will be enough at this time to

call attention to interveners exhibits 30 and 31 (Record pp. 220, 224), being report showing results of operation and general balance sheet of the Power Company for September, 1912. It there appears that the net earnings of the Power Company available for fixed charges for the first nine months of 1912 were \$175,598.79. That the total of fixed charges including the item "contingent interest," which is explained in Note (A) on page 221, exceeded that amount by \$36,655.33, which represented a deficit then facing the Company. It further appeared that the net earnings of the Company had decreased over those of the previous year by sixteen and two-tenths per cent. (The Exhibit is a little obscure in that it fails to print deficits in red as shown on the original exhibit, but whether surplus or deficit is indicated will readily appear from a subtraction of the figures, giving the result.) It further appeared that the Company had, on August 31st, but \$49,420.59, cash on hand. That it had accrued bond interest of \$110,-266.65, and accounts payable of \$80,078.20. That the Company could not continue to operate profitably or at all and meet its obligations was apparent.

By way of parenthesis it may be observed here, so that the matter may be disposed of, that the difference between the showing of the Company December 31, 1912, exhibiting a deficit of \$59,654.28, as compared to a profit shown in the audits of \$146,532.54 for the preceding year, and an equally favorable showing for years prior to that, which is alleged in the Bill of Intervention in support of the charges of

mismanagement, is explained by the auditors (Record p. 436), as follows:

“Results for the year ending December 31, 1912, after providing for interest on bonded and floating indebtedness, but subject to the qualifications made in the preceding paragraph, show a loss of \$59,654.28, as compared with a profit of \$146,532.54 for the year ending December 31, 1911. This unfavorable showing is largely due to the fact that in 1912 there has been deducted the sum of \$133,443.90 in respect of interest on bonds issued in connection with the Ox Bow construction, all interest on these bonds having been previously charged to capital.”

Further, with respect to increases of operating expenses, we call attention to the following from the auditor's report (Record p. 435):

“Included under the heading of operating plants at Boise and other points is an account of development amounting to \$32,696.52, representing charges for advertising, management, salaries, canvassing, soliciting, etc., to December 31, 1910. Similar expenses aggregating \$23,339.80 were charged to this account during the year 1911 by the company's officials, but we have treated these charges as operating expenses in this report, as we are of the opinion that the Company had, on December 31, 1910, arrived at a point where such charges could no longer be regarded as capital expenditure.”

The balance of the increase in operating expense is explained by the increase in purchase power charge as shown on Exhibit 30 above mentioned (p. 220), which, for the first nine months of 1912, was \$26,863.46, as against \$212.61 for 1911, due to the growing demands on the Power Company's system and the inadequacy of its power supply.

We do not regard these points as of importance, except as explaining the prejudicial inference which might otherwise be drawn against the new management for the very unfavorable showing of 1912 as compared with 1911, and we do not desire to again refer to it.

It will thus be observed that there was no prospect of the Power Company then meeting the accruing installment of the interest upon the consolidated bonds, which the Bankers had purchased and delivered to the Railway Company in exchange for its securities. But this was not all. The record shows (pp. 431, 432) that a new element had entered into the situation since the Fall of 1911.

"A Company known as the Beaver River Power Company obtained a franchise in Boise in February or March, 1912, and built its transmission lines to Boise City. Commencing the first part of July in that year, and continuing for several months, the Company solicited business in Boise City, the principal work being done in July and August. At the time the base rate of the Idaho-Oregon Light & Power Company was 15c per kilowatt hour with a 10% discount for

prompt payment. For larger quantities of current the rates were somewhat less, there being a sliding scale depending upon the amount used. The advertised and solicited rates of the Beaver River Power Company during that time were 9c per kilowatt hour net as a base rate, with proportionately lower rates following the same general curve rates as the Idaho-Oregon Company. This Beaver River Company installed a distributing system in Boise during 1912, and commenced actual service of current in December, 1912, from a power plant owned by that Company."

The immediate capital requirements of the Company on September 1, 1912, are shown by respondents Exhibit F (Record pp. 426, 429), showing that for the four remaining months of the year, or to December 31, 1912, the Company, in addition to all its estimated income and revenue needed for that period \$203,180.

This matter was considered at a meeting of the Executive Committee of the Company on August 30, 1912, (Record p. 232), where the following occurred:

"The question of raising additional funds for the Idaho-Oregon Light & Power Company to take care of the extension of distributing systems and the building of transmission lines was taken up and discussed, and on motion of Mr. Watson, seconded by Mr. Mainland, it was

"Resolved, that a statement should be prepared and submitted by Mr. Markhus, as general man-

ager of the Idaho-Oregon, showing the expenditures that had been made by that company in connection with the building of transmission lines, sub-stations, and distributing systems since July 1, 1910, and that the same should be forwarded to the Board of Directors for approval, for the purpose of being filed with the trustee under the mortgage, so that additional bonds may be secured for the raising of funds."

At this time the Bankers had purchased from the Company \$1,325,000 of the consolidated bonds which they were required to purchase by the contract of September, 1911, and were still obligated to purchase \$175,000 of those bonds, which would have yielded \$140,000 cash. (Record p. 237). The question of the future of the Company came up at a director's meeting held in New York City on September 25, 1912, shortly following the meeting of the Executive Committee at Boise on August 30th. The minutes of this meeting are set out at pages 233 to 250. Eight directors were present out of the total of eleven, as shown on page 233. The material part of these Minutes are on Pages 236 to 245, inclusive. Among other things the following appears:

"Mr. Watson made a statement as to the financial condition of the Company, and in conclusion recommended the raising of the sum of two hundred and fifty thousand dollars (\$250,000) to meet the requirements of the Company for the next seven months.

“The Chairman presented and read to the meeting an agreement which Messrs. Kissel, Kinnicutt & Co., and Messrs. Wm. & S. Mainland proposed to make with this Company covering the loan to this Company of the sum of two hundred and fifty thousand dollars (\$250,000) as above mentioned.”

The Agreement recited the fact that Kissel, Kinnicutt & Company were further obligated to buy \$175,000 of the consolidated bonds to yield \$140,000, but were not willing to advance any more money, and therefore, in consideration of releasing them from the obligation to buy the consolidated bonds they agreed to procure the Railway Company to loan to the Power Company the sum of \$250,000, which it was recited was required by it, but should receive as collateral for such loan its first mortgage bonds in the ratio of \$2.00 per bond for \$1.00 of loan, and should likewise have the privilege of exchanging not to exceed \$500,000 of the consolidated bonds, which had been purchased for a like amount of the First and Refunding Bonds secured by the mortgage to plaintiff, as a bonus or premium for making the loan. After reciting the agreement, the minutes continue as follows: (Record p. 242.)

“After a discussion of said agreement, on motion duly made and seconded, the following resolution was unanimously adopted, with the exception of Mr. Fuller’s and Mr. Sinclair Mainland’s votes which were not cast:

“RESOLVED, that the agreement so presented and read to the meeting, be, and the same hereby is, in all respects, confirmed, ratified and approved, and that the proper officers of the Company be, and they hereby are authorized and requested to execute said agreement in the name of this Company and in its behalf, and to exchange the same when executed with Messrs. Kissel, Kinnicutt & Co., and Messrs. Wm. & S. Mainland.

“The Chairman thereupon presented and read to the meeting a proposal from Idaho Railway Light & Power Company to advance to this Company the sum of two hundred and fifty thousand dollars (\$250,000), which proposal was as follows:”

Then follows the Railway Company’s proposal in accordance with the offer of Kissel, Kinnicutt & Company, and on Page 245, at the conclusion of such proposal, the following:

“RESOLVED that the offer of Idaho Railway Light & Power Company so presented to this meeting, be, and the same hereby is, accepted, and that the proper officers of this Company be, and they hereby are, authorized and directed to do all such things as may be requisite and necessary to close said loan.”

There is considerable testimony in the record as to what took place at this meeting. It is not disputed that the transactions did take place as recorded in

the minutes, but it is contended, and there is evidence in support of the contention, that of the eight directors, for one reason and another, only four voted affirmatively for the first proposition of releasing the Bankers from their obligation. It is undisputed, however, that, as to the proposition of the Railway Company making the loan, there were no dissenting votes, and the contract was executed as authorized. We do not cite the record in detail as to these disputes, because in the view we take of the case they are not material. Generally, as typical of the testimony on this subject we refer to Record pages 290-302, 309-313, as introduced by interveners; 272-277 as introduced by respondents; 285-287 introduced by interveners, but favorable to respondents.

With respect to transactions had under this contract, the witness, G. E. Hendee, Secretary of both companies, stated, (Record, p. 258) :

“The loans provided for at that meeting in connection with the exchange of consolidated for refunding bonds were made to the Power Company as follows :

“October 4, 1912, \$100,000.00; November 1, 1912, \$20,000.00; December 11, 1912, \$60,000.00; December 17, 1912, \$40,000.00; January 3, 1913, \$30,000.00, and continued: ‘440,000 first and refunding Idaho-Oregon five per cent bonds were put up as collateral against this loan, and such bonds were exchanged bond for bond for a like number of consolidated six per cent bonds previously held by the Railway Company,

the Railway Company taking consolidated six per cent bonds as collateral for the loans when such exchanges were made.' ”

This was the first transaction covered by the testimony. The reasons given for it may be inferred from the testimony hereinbefore referred to as to the financial requirements and future perils of the Company through competition, and were the obvious ones of the necessity of keeping the Company going, at least until its future could be determined with some certainty. Thus the managing director, Mr. Watson, stated (Record p. 275) :

“There was a great deal of uncertainty at that time as to what our future was to be—you know what I am referring to. Q. Uncertainty in what respects? A. Uncertainty in connection with competition was staring us in the face. Q. Did you feel that there was uncertainty about the Company being unable to keep on going? A. In view of the competition. Q. In view of everything? A. In view of everything, yes.”

So Mr. Wiggin, a Director of the Company and called by interveners, stated (Record p. 286) :

“ ‘My understanding as to the need of money was it was simply to keep the Company going.’ ‘It was represented to us that we just had to have money, that they needed it and it was urgent.’ ‘I understand that part of it was for debts already incurred.’ ‘We understood they needed the money, and that if they didn’t get the money

they would fail.' 'Q. Fail at once? A. Yes but I don't know for how long a time, nor they didn't say how much would put them on a financial footing. It seemed to be the wise thing to do at the moment to give them money and keep them from failing.' "

That the Company was badly in need of money was admitted by all the witnesses. Thus, at page 311, Mr. William Mainland, one of the principal witnesses for interveners, stated:

"Mr. Markhus, as Manager of the Company got up the statement referred to in the minutes, but he did not recall that it had been sent to him prior to September 25, 1912, nor had it ever been received or considered by him or by the Executive Committee up to that date. From the witness' view point this two hundred fifty thousand dollars was not sufficient to meet the Company's requirements, or put it on a secure basis, his contention being that the Company needed additional power, and that sum was not sufficient to produce it. He did not recall any specific statement as to what should be done with the \$250,000, except that it was for general corporate purposes, some of the money having already been spent. The statement was not sent to him as President of the Company because all communications, unless otherwise instructed, were sent by Mr. Markhus to Mr. Watson."

Also Mr. Sinclair Mainland, for the interveners, stated (pp. 322, 323):

“He knew the Company was in need of funds at the time, and the question of financial needs had been a matter of frequent discussion between the responsible officers of the Company. ‘It is a matter of frequent discussion, I believe, in every business, including the New York Central, that they need further funds for their business, and probably we discussed the need of funds when we met.’ ”

As to the second transaction mentioned in the Railway Company’s answer, there was introduced in evidence, as respondents’ Exhibit B, minutes of a meeting of the Executive Committee of the Power Company held in New York on December 27, 1912 (Record pp. 400-413). It appears from these minutes that there had been a controversy between the Power Company and the Bates & Rogers Construction Company, and that to assist in the settlement of the controversy the Railway Company had agreed to give the Construction Company one-hundred shares of its common stock, fifty shares of its preferred stock, and to, in effect, guarantee at eighty per cent of their par value, \$25,000 face value of the consolidated or second mortgage bonds of the Power Company delivered to the Bates & Rogers Company by the Power Company in the settlement, the precise commitment of the Railway Company being to purchase such bonds, at the option of the Bates & Rogers Company, at eighty at the end of eighteen months. As a condition of this agreement the Railway Company demanded and procured the right to an additional exchange of five

hundred of its consolidated bonds then held by it for a like amount of first mortgage bonds. The precise agreement between the Power and the Railway Company is set forth at pages 418 to 421 of the Record.

What was done after the execution of this agreement is shown in the testimony of Mr. Hendee (Record p. 259) as follows:

“In connection with the contract mentioned in the minutes of December 27, 1912, with respect to the settlement of the Bates & Rogers controversy, the Railway Company delivered to the Bates & Rogers Company one hundred shares of the common stock and fifty shares of the preferred stock of the Railway Company, and twenty-five thousand consolidated six per cent bonds of the Power Company, with the requisition that the Railway Company purchase such bonds under the conditions and at the figures specified in the contract (80 per cent of their par value). Under these two agreements of September and December referred to in the minutes of those dates the following exchanges of bonds were made: January 3, 1913, \$38,000.00; January 6, 1913, \$492,000.00; January 13, 1913, \$65,000.00; February 10, 1913, \$123,000.00. The serial numbers of the Power Company refunding bonds (being the so-called first mortgage bonds secured by the mortgage which has been foreclosed) obtained by the Railway Company in these exchanges were as follows: Numbers 2501 to 2514; 2525 to 2534; 3051 to 3192; 3198 to

3213; 3219 to 3279; 3285 to 3754. (All numbers given are inclusive).

“None of the loans made by the Railway Company to the Power Company have been repaid by the latter. The Railway Company surrendered to the Power Company an equivalent amount of second mortgage or consolidated bonds for the first and refunding bonds taken by it as provided in such agreement.

“The total number of consolidated or second mortgage bonds issued by the Power Company was \$1,800,000, of which the Railway Company now owns \$854,000, and holds as collateral against loans \$750,000. Bates & Rogers Construction Company holds \$30,000, and the balance outstanding in the hands of the public is \$166,000.”

The testimony with respect to this meeting of December 27th is quite remarkable in that two of the witnesses, the Messrs. William and Sinclair Mainland, who were members of the Committee, disclaim emphatically any knowledge of the agreement having been made, and claimed no precise recollection as to the holding of the meeting at that time. (William Mainland, pages 314, 315; Sinclair Mainland, page 320). However, this would not seem as of importance as Mr. William Mainland admittedly conducted and closed the negotiations with Messrs. Bates & Rogers (pages 312-315, page 318), and signed, on behalf of both companies, the contract in question. (Page

421). The reasons for the Bates & Rogers transaction, from the standpoint of the Power Company, appear principally in the testimony of the managing director, Mr. Watson. (Pages 265-272, 279-280). It appears that these negotiations had been under way for about a year. They were formally considered at a meeting of the Executive Committee on July 24, 1912, which appears on pages 268-271 of the Record, and was strongly recommended by the Company's consulting engineer by a letter recited on page 280 of the Record.

The foregoing presents substantially the admitted facts in the case, and the only facts in the view we take of it that are material for a determination thereof. Points of conflict have been mentioned, and should analysis of any of the conflicting testimony or the inferences drawn therefrom become necessary during the argument it will be referred to in the brief.

The Court in its decision, after stating briefly the formal proceedings, said (pp. 133-134) :

“It thus appears that while in form the Priest committee has taken the initiative, the proceeding is in anticipation of the foreclosure sale and the distribution of the proceeds thereof; and, considering the substance only, the controversy is to be deemed to be one arising after the sale, with the Railway Company seeking an order distributing to it its proportionate share of the proceeds of the property, and the Priest committee, as bondholders, resisting, upon the grounds set forth in their

complaints in intervention. It is upon the assumption that such is the real nature of the proceedings that, for the convenience of the parties, and in deference to their desire, the issue is determined at the present time."

The Court then proceeded to sustain the validity of the certification of the 107 bonds (p. 134), and as to the 718 bonds held both the September and December transactions fraudulent as against interveners (pp. 135-151), but concluded by holding (pp. 151-152) that the Railway Company "should be recognized as having an equity in the bonds corresponding to the consideration it has paid out, of which the Power Company has received the benefit," and ordered an accounting for the purpose of determining the extent of this equity. On September 18th the Court rendered its Supplemental Decision (pp. 153, 154) as follows:

"The parties have now appeared by their respective counsel, and have agreed that the existing record touching the transaction of September 25th, 1912, should be construed as showing that the Railway Company advanced \$250,000.00, and no more, for which it is entitled to credit under the principle of adjustment explained in the opinion filed August 24, 1914. From this amount, therefore, will be deducted the \$140,000.00 due under the original contract, and the Railway Company will be decreed an equitable lien upon the 440 first mortgage bonds for the balance of \$110,000.00, with interest, and

it will also be decreed the right to receive the 175 second mortgage bonds contracted for.

“As to the Bates & Rogers transaction, no additional evidence has been offered, and it is not thought that the Record shows that the Railway Company has parted with anything of value on account thereof or has any substantial equities in the premises.”

Upon this decision decree was entered accordingly.

The Decree of the Court, in so far as material, is set forth in paragraphs III, IV, V and VI, on pages 157 to 162, inclusive, of the Record. Particular attention is here called to paragraph III and part of Paragraph IV, reading as follows:

III.

“That the alleged agreement of September 25th, 1912, which includes the proposed exchange of bonds of the issue secured by the mortgage to the plaintiff to the number of 500, having a par value of \$500,000.00, for other junior or second mortgage bonds, having a par value of \$500,000.00, entitled ‘Consolidated First and Refunding Mortgage Bonds,’ secured by mortgage to the defendants Bankers Trust Company and F. N. B. Close, and the exchange of such bonds made in pursuance thereof, are illegal and void, and that the said respondent Idaho Railway, Light & Power Company is not entitled to share in the proceeds of the mortgage sale of the property

covered by the said mortgage to the plaintiff, as the owner of said bonds, exchanged in pursuance thereof, and secured by said mortgage to the plaintiff, except as hereinafter provided."

IV.

* * * * *

"IT IS ORDERED, ADJUDGED and DECREED that the said Idaho-Oregon Light & Power Company, by its Receiver W. J. Ferris, is entitled to receive back from said Idaho Railway, Light & Power Company the 440 first mortgage bonds, secured by the trust deed to the plaintiff herein, which were exchanged as part of said transaction; that the said Idaho Railway, Light & Power Company, by its Receiver O. G. F. Markhus, is entitled to receive back from the said Idaho-Oregon Light & Power Company second mortgage or consolidated bonds to the amount of \$440,000.00 which it, the said Idaho Railway, Light & Power Company, gave in said exchange; that said Idaho Railway, Light & Power Company by its Receiver is entitled to recover from said Idaho-Oregon Light & Power Company the sum of \$110,000.00, being the amount advanced or loaned by said Railway Company to said Power Company in excess of the \$140,000.00 which the said Power Company was entitled to receive, with interest at the rate of six per cent. (6%) per annum thereon, from the dates when the sums constituting the said \$110,000.00 were so ad-

vanced, and that such advances and the dates thereof are as follows:

December 14, 1912,\$40,000.00

December 16, 1912,\$40,000.00

January 4, 1913,\$30,000.00

that the said Idaho Railway, Light & Power Company, by its Receiver, is entitled to the possession, as collateral security for the repayment of the said \$110,000.00 and interest, of the \$440,000.00 of first mortgage bonds originally deposited by said Idaho-Oregon Light & Power Company as collateral for the loan agreed to be made on September 25th, 1912; it appearing that the \$440,000.00 of first mortgage bonds are now in the possession of the said Idaho Railway, Light & Power Company, or its Receiver. IT IS ORDERED AND ADJUDGED that he retain the same, but not as the property of the said Idaho Railway, Light & Power Company but as collateral to the said indebtedness of \$110,000.00 and interest, as above set forth, and that all second mortgage or consolidated bonds held by said Idaho Railway Light & Power Company, or its Receiver, as collateral to the indebtedness, or alleged indebtedness, growing out of the agreement of September 25th, 1912, be surrendered by said Idaho Railway, Light & Power Company and its Receiver to said W. J. Ferris, Receiver of said Idaho-Oregon Light & Power Company.

The latter half of Paragraph VI, which recites the

Bates & Rogers transaction, referred to in the answer is as follows:

“IT IS FURTHER ORDERED, ADJUDGED and DECREED, that the said agreement for such further exchange is illegal and void, and the exchange made thereunder invalid and fraudulent, and that said Idaho Railway, Light & Power Company, or its Receiver, shall return to said Idaho-Oregon Light & Power Company or its Receiver the said 278 first mortgage bonds, having a par value of \$278,000.00, and that the said Idaho-Oregon Light & Power Company or its Receiver shall return to said Idaho Railway, Light & Power Company or its Receiver the said second or consolidated bonds to the par value of \$278,000.00, so far as they may be in its or his possession either now or in pursuance of the foregoing portion of this Order, and that so far as they may be already in the possession of the Railway Company the said Idaho-Oregon Light & Power Company and its Receiver shall relinquish all right and title thereto.”

Paragraph VII decrees to the Railway Company the right to receive from the Power Company, second or consolidated bonds secured by mortgage to Bankers Trust Company, in the amount of \$175,000, being the amount of bonds which the Bankers were still entitled to receive under the original contract of September 1911, under which they went into the enterprise. Paragraph VIII (pp. 163, 164) may be deemed material and is therefore quoted as follows:

“This decree is entered in advance of sale and distribution under the said foreclosure at the request of and for the convenience of the parties, and upon the agreement in open court, all parties hereto consenting, that this decree shall be regarded so far as such fact may be at any time material, as having been made after sale and upon distribution, and as upon an application of said Railway Company as bondholders to share in such distribution and as against objection by these intervening bondholders and that no objection shall be made to said decree by any party affected thereby at any time or place, upon the ground that the same is premature or untimely.”

In addition to the evidence hereinbefore abstracted, the following occurred at the trial:

The Court admitted over the objection of the appellant, Railway Company, evidence consisting of financial reports of operations of the Railway Company showing its gross earnings, operating expenses, net earnings, fixed charges, etc., ostensibly for the purpose of “showing the condition of the Railway Company in 1912, as establishing a motive for the transaction in issue.” Several of these offers were made during the course of the trial and the objections overruled and the testimony admitted. Similarly reports of the condition of the Idaho-Oregon Company both for a series of years and for the specific year 1912, were admitted over like objection. These offers and objections, the

rulings thereon and the substance of the testimony admitted, together with reference to the page of the record at which the objections and testimony appears, are shown at length in the Specification of Errors and will not be set forth here. For some purpose which is not disclosed, but which may be assumed to have been to show the prosperous condition of the Power Company prior to the Railway management, an audit of the Company was offered in evidence and admitted over a like objection on the ground of irrelevancy and immateriality, and will likewise be specifically referred to in the Assignments of Error.

This statement we believe presents as succinctly as can completely be done the questions involved in this case, and which will be hereinafter discussed.

SPECIFICATIONS OF ERRORS.

The errors specified, in the language of the Assignment of Errors so far as they are urged here, with references, where necessary, to the pages of the record upon which the matters assigned as erroneous appear, are as follows:

The said Decree is erroneous and unjust to the said defendants (appellants here) and to each of them, in the following particulars:

I.

Because the said Court erred in sustaining said Bill in Intervention and entering Decree thereon.

II.

Because the said Court erred in holding and decreeing that the agreement of September 25, 1912, for exchange of bonds of the issue secured by the mortgage to the plaintiff having a par value of \$500,000, for junior or consolidated First and Refunding bonds secured by mortgage to the defendants, Bankers Trust Company and F. N. B. Close, having a like par value of \$500,000, and the exchange of such bonds made in pursuance thereof to be illegal and void, and in holding and decreeing that respondent, Idaho Railway, Light & Power Company is not entitled to share in the proceeds of the mortgage sale of the property covered by the mortgage to the plaintiff as the owner of said bonds, except as thereafter provided in said decree.

III.

Because the said Court erred in holding and decreeing that at the time of said agreement of September 25, 1912, by which the said Idaho Railway, Light & Power Company was to loan \$250,000, to said Idaho-Oregon Light & Power Company that the latter company was entitled at that time to receive upon demand \$140,000 in payment for second or consolidated bonds to the par value of \$175,000.00.

IV.

Because the said Court erred in holding and decreeing that all said transactions, to-wit, agreement for and making said loan the release of the Idaho-Oregon Light & Power Company of its rights to de-

mand and receive \$140,000, in payment for \$175,000, par value of consolidated bonds, the agreement for exchange of bonds by which the said Idaho-Oregon Light & Power Company surrendered first mortgage bonds and received back second or consolidated bonds and the several deposits and exchanges of the collateral in connection therewith were connected and inter-dependent and all constituted a consideration for the other.

V.

Because the said Court erred in holding and decreeing that said Idaho-Oregon Light & Power Company by its Receiver, W. J. Ferris, is entitled to receive back from said Idaho Railway, Light & Power Company the 440 First Mortgage Bonds secured by trust deed to the plaintiff and exchanged as part of said transaction.

VI.

Because said Court erred in holding and decreeing that said Idaho Railway, Light & Power Company, by its Receiver, O. G. F. Markhus, is entitled to receive back from said Idaho-Oregon Light & Power Company second mortgage or consolidated bonds to the amount of \$440,000, which said Idaho Railway, Light & Power Company gave in said exchange.

X.

Because the said Court erred in holding and decreeing that the said Receiver holds said bonds not

as property of said Idaho Railway, Light & Power Company, but as collateral to an indebtedness of \$110,000, and interest.

XIII.

Because the said Court erred in refusing to hold and decree that the said Idaho Railway, Light & Power Company, or its Receiver by virtue of said agreement of September 25, 1912, and the exchange of bonds made thereunder, was the absolute owner of \$500,000 face and par value of said so-called first mortgage bonds secured by mortgage to the plaintiff, State Bank of Chicago, and entitled to share in the distribution of the proceeds of foreclosure sale on that basis.

XIV.

Because the said Court erred in refusing to hold and decree that the said Idaho Railway, Light & Power Company, or its Receiver, was the owner of \$440,000 face value of said so-called first mortgage bonds secured by the mortgage to the plaintiff, and entitled to share in the distribution of the proceeds of foreclosure sale on that basis.

XV.

Because the said Court erred in refusing to hold and decree that the said agreement of September 25, 1912, and all transactions had thereunder were valid and enforceable.

XVI.

Because the said Court erred, on decreeing that

said contract of September 25, 1912, was invalid in refusing to hold and decree that the said Idaho Railway, Light & Power Company or its Receiver were nevertheless entitled to hold all bonds secured by it under said transaction, and to share in the distribution of the proceeds thereof up to the amount advanced by said Idaho Railway, Light & Power Company under the said contract of September 25, 1912, to-wit, \$250,000, with interest at the rate of six per cent per annum from the dates of the various advances thereof as shown by the evidence, to-wit, on \$100,000 from October 4, 1912, on \$20,000 from October 31, 1912, on \$60,000 from December 11, 1912, on \$40,000 from December 6, 1912, on \$30,000 from January 3, 1913.

XVII.

Because the Court erred in holding and decreeing that the agreement for further exchange of bonds made in December, 1912, under which bonds of the par value of \$278,000, secured by the mortgage to the plaintiff, were procured by surrender of the so-called second mortgage or consolidated bonds secured by the mortgage to the Bankers Trust Company and F. N. B. Close, and under which agreement bonds of the par value of \$278,000 were exchanged, was illegal and void, and the exchange of said bonds invalid and fraudulent, and erred in holding and decreeing that said Idaho Railway, Light & Power Company, or its Receiver, should return to Idaho-Oregon Light & Power Company, or its Receiver, the said first mortgage bonds of the par value of \$278,000.00.

XVIII.

Because the Court erred in holding and decreeing that the Idaho Railway, Light & Power Company is entitled to receive from Idaho-Oregon Light & Power Company second or consolidated mortgage bonds secured by the mortgage to the Bankers Trust Company and F. N. B. Close to the par value of \$175,000 on account of \$140,000 charged against advances to the Idaho-Oregon Company, and erred in holding and decreeing that upon sale under foreclosure, said Idaho Railway, Light & Power Company should be entitled to share in the distribution of the surplus for second mortgage bondholders as holder of such bonds to the par value of \$175,000 in addition to other second mortgage bonds held by it.

XIX.

Because the said Court erred in refusing to hold and decree that the said contract of December, 1912, for exchange of consolidated or second mortgage bonds for first mortgage bonds secured by the mortgage to the plaintiff was in all respects a valid and binding contract, and further erred in refusing to hold or decree that said exchange of bonds of the par value of \$278,000 made under said contract was a legal and valid exchange and vested title in said 278 first mortgage bonds in said Idaho Railway, Light & Power Company, or its Receiver.

XX.

Because the said Court erred in refusing to hold and decree that the Idaho Railway, Light & Power

Company parted with valuable consideration in said exchange of 278 bonds last mentioned, and erred in refusing to decree it any reimbursement on account thereof upon ordering surrender of the so-called first mortgage bonds received under such exchange.

XXI.

That the Court erred in refusing to decree that the said Idaho Railway, Light & Power Company, or its Receiver, were the lawful owners and holders of said 718 bonds procured in said exchanges by virtue of said contracts hereinbefore mentioned in these assignments and in said decree, and entitled to share in the distribution as owners thereof.

XXII.

That the said Court erred in holding that said interveners, A. W. Priest, and others, as bondholders, were entitled to raise the question of the validity of the said contracts of September 25, 1912, and of the exchange of the bonds made thereunder.

XXIII.

That the said Court erred in admitting the following evidence over the objection of the respondents (appellants here) as herein noted. (Record pp. 203-206.)

MR. CUMMINS: The interveners now offer page two of the monthly report of operations of the Idaho Railway, Light & Power Company, for December, 1912, which was introduced as Exhibit 4, Fuller's Cross-Examination. It shows the gross earnings for

the month of December, 1912, and for the twelve months then ending also the operating expenses, the net from operation, taxes, net from operation and taxes, non-operating revenues, railway rental, amount available for fixed charges, the amount of interest, rental of joint facilities, total fixed charges, surplus, and construction account. It is offered for the purpose of showing the condition of the Railway Company in 1912, as establishing a motive, or tending to establish a motive, for the transaction which is in issue here. I might say in this connection that I expect to offer, for the same reasons, another sheet of the same report, and corresponding sheets of the same months of the Idaho-Oregon for the purpose of showing the conditions of these two companies at that time.

To which said offer said respondents, by their counsel, duly objected on the ground that the same was irrelevant, immaterial, not germane to the issues on trial, nor within the allegations which the respondents were by the order of the Court directed to answer, but involves matters entirely foreign thereto, and which respondents were expressly excused by the Court's order from answering, which said objection was by the court overruled, in the following language:

"This is somewhat remote but I think perhaps I shall let it go in, it may have some bearing upon the good faith and reasonableness of the transaction. The objections will be overruled."

To which said ruling respondents, by their coun-

sel, duly excepted, and still except, and which said exception was by the Court allowed.

Intervenors Exhibit No. 5 was thereupon read in evidence, being said sheet showing the results of operation of the said respondent, Idaho Railway, Light & Power Company, for the month of December, 1912, showing for that month and for the twelve months of 1912 the earnings, operating expenses, taxes, non-operating revenue, railway rental and net earnings, of said respondent Idaho Railway, Light & Power Company, and the fixed charges against the operation of the same with interest during construction.

XXIV.

The said Court erred in permitting the following question over the objection of the said respondents, (appellants here) therein noted, to which answer was made as herein stated: (Record pp. 206-207.)

MR. CUMMINS: (Continuing reading Fuller Deposition). Q. This report shows earnings for twelve months of \$165,471.71, and net from operations and taxes, \$111,636.82; non-operating revenue \$24,898.43; railway rental \$89,604.49, making available for fixed charges \$246,139.74. Will you state the character and from what source derived was the non-operating revenue of nearly \$45,000?

To which question counsel for respondents objected on the ground that the same was irrelevant and immaterial and not germane to the issues on trial, nor within the allegations which the respondents

were directed to answer, which said objection was by the Court overruled, and to which said ruling the said respondents, by their counsel, duly excepted and now except, and which said exception was allowed.

A. "I presume this is the income from the Idaho-Oregon securities held by the Railway Company." Such second mortgage bonds as the Railway held at that time. This interest was paid in November, 1912, but not in May, 1913. The item \$86,604.49, designated railway rental is the net earnings of the Railway Company, which at that time was only partially built, interurban street railway lines in course of construction; The gross earnings less operating expenses and taxes; that is the ordinary expenses of operation of the Traction property, the company being charged with current furnished by the Railway Company at a price of one and one-half cents per kilowatt hour.

XXV.

The Court erred in permitting the following evidence to be admitted pursuant to the offer and over the objection herein stated. (Record pp. 207-211.)

MR. CUMMINS: "I have heretofore offered sheet two of the monthly operating report of the Idaho Railway, Light & Power Company for December, 1912. I now desire to offer sheet eight of the same report, showing the liabilities of the Company. It is the balance sheet * * * as of December 31, 1912."

To which offer respondents, by their counsel, then and there objected, on the ground that the same is

irrelevant and immaterial, and not germane to the issues on trial, which said objection was by the Court overruled, and to which said ruling the respondents, by their counsel, duly excepted, and still except, and which exception was by the Court allowed.

Intervenors Exhibit No. 27 was thereupon admitted, being condensed balance sheet of said respondent, Idaho Railway, Light & Power Company, as of December 31, 1912, showing the assets and liabilities of the Company as of November 30, 1912, and of December 31, 1912.

XXVI.

The Court erred in admitting the following evidence pursuant to the offer and over the objection herein stated. (Record pp. 212-214.)

MR. CUMMINS: "I also offer sheet two of the monthly operating report of September, 1912, of the Idaho Railway, Light & Power Company."

To which offer respondents, by their counsel, then and there duly objected, on the ground that the same was irrelevant, immaterial and not germane to the issues involved, which said objection was by the Court overruled, and to which ruling respondents, by their counsel then and there excepted, and still except, and which said exception was by the Court allowed.

Thereupon intervenors Exhibit No. 28 was received in evidence, being a statement of results of operation of the respondent, Idaho Railway, Light & Power Company, for the month of September, 1912,

and for the nine months of said year 1912, ending with September 30, 1912, showing gross earnings, operating expenses, taxes, net earnings, non-operating revenue, railway rental and the amount available for fixed charges with said fixed charges, surplus and construction account with tabulated statement of interest bearing securities of said Company.

XXVII.

The Court erred in admitting the following evidence pursuant to offer and over the objection herein stated.

MR. CUMMINS: I offer sheet eight of the same report. (Record pp. 215-218.)

To which said offer counsel for respondents then and there duly objected on the ground that the same is irrelevant and immaterial and not germane to the issues involved, which said objections were by the Court overruled, to which ruling said respondents, by their counsel then and there duly excepted, and still except, and which said exception was by the Court allowed.

Thereupon interveners Exhibit No. 29 was read in evidence, being condensed general balance sheet of respondent, Idaho Railway, Light & Power Company, showing the property, plant, equipment, total assets and liabilities of the respondent, Idaho Railway, Light & Power Company, as of August 31st and of September 30, 1912.

XXVIII.

The Court erred in admitting the following evi-

dence pursuant to offer and over the objection herein stated. (Record pp. 219-229.)

MR. CUMMINS: I offer sheet two of the monthly operating report of the Idaho-Oregon Light & Power Company for the month of September, 1912; sheet eight of the same report; and sheet two and eight of the report of said Company for December, 1912.

To which said offer and to each part thereof, respondents, by their counsel, duly objected on the ground that the same was irrelevant, immaterial and not germane to the issues involved in the cause, which respondents were directed to answer, and which said objection was by the Court overruled, and the said sheets and each of them were admitted by the Court "for the purpose of showing the status of the business of the Idaho-Oregon Company as bearing upon the real value of the bonds," to which said ruling of the Court the said respondents, by their counsel, then and there duly excepted, and still except, and which said exception was by the Court allowed.

Said pages from said reports were thereupon introduced in evidence, being interveners Exhibit No. 30, results of operation of respondent, Idaho-Oregon Light & Power Company, for the month of September, 1912, and for the nine months of the year 1912, ending September 30th, 1912, both as compared with the year 1911, and showing gross earnings, operating expenses, net earnings, taxes and fixed charges and like data. Also interveners Exhibit No. 31, being condensed balance sheet of respondent, Ida-

ho-Oregon Light & Power Company, showing its total assets and liabilities of August 31st and September 30th, 1912.

Also interveners Exhibit No. 32, showing results of operation for said respondent, Idaho-Oregon Light & Power Company, for December, 1912, as compared with December, 1911, and for the twelve months of 1912, as compared with the twelve months of 1911, including gross earnings, operating expenses, taxes and fixed charges of said report for said period.

Also interveners Exhibit No. 33, being condensed balance sheet of the respondent, Idaho-Oregon Light & Power Company showing the assets and liabilities of said Company as of November 30th and as of December 31, 1911.

XXIX.

The Court erred in admitting the following evidence pursuant to offer and over the objection herein stated. (Record pp. 230-231.)

MR. CUMMINS: I offer a sheet showing the gross earnings, the operating expenses, and net earnings of the Idaho-Oregon Company for each year from 1907 to 1912, inclusive, and ask that it be marked interveners Exhibit No. 40, re 718 bonds. These figures are derived from audits of the books of the Company, made by Marwick, Mitchell, Peat & Company, chartered accountants; first, an audit for the four years ending December 31, 1910, dated New York, May 8, 1911, addressed to William Mainland, Esq., President of the Idaho-Oregon Light & Power

Company. A part of the report reads as follows: "The balance sheet submitted, attached to our report of even date, in our opinion is a full and fair presentation of the financial position of the Company as of December 31, 1910, excluding any contingent liabilities or uncompleted contracts. * * * The operations of the company during the period of four years under review, after charging off all expenses applicable thereto, including maintenance and renewals, but before making provision in respect to depreciation of the physical properties, the amount of which, however, would be of relatively minor importance, during this period, resulted as follows:"

MR. MACLANE: The opinions of the accountants as to whether these are proper or otherwise, except as stated in the audit themselves, it would seem to me would hardly, * * * We don't want to permit the inference to be drawn that we are bound by the running commentaries of the auditors on their own audit.

MR. CUMMINS: Not at all. The audit for the year 1911 is addressed to the Board of Directors of the Idaho-Oregon Light & Power Company, and is dated May 8, 1912. The audit for the year 1912 is addressed to the Board of Directors of the Idaho-Oregon Light & Power Company, and is dated April 3, 1913. I understand that it is admitted, subject only to the general objection as to its materiality.

To which said offer respondents, by their counsel, then and there objected on the ground that the same was irrelevant and immaterial to the issues involved,

which said objection was by the Court overruled, and to which ruling respondents by their counsel excepted, and still except, and which said exception was by the Court allowed.

Thereupon the said Exhibit was introduced in evidence as interveners Exhibit No. 40, being as follows:

Year	Gross Earnings	Operating Expenses	Net Earnings
1907	189,045.89	98,586.48	90,459.41
1908	196,416.16	83,438.80	112,977.36
1909	215,579.57	73,531.31	142,048.26
1910	297,041.43	82,526.01	214,515.42
1911	361,297.47	128,399.62	232,897.85
1912	405,210.21	189,318.10	215,892.11

XXX.

The Court erred in admitting the following evidence pursuant to offer and over the objection herein stated. (Record pp. 375-378.)

The following, being a request upon the Trustee to foreclose the mortgage to the plaintiff, State Bank of Chicago, was offered in evidence, to which offer the respondents, by their counsel, duly objected on the ground that the same was incompetent, irrelevant and immaterial, not germane to the issues on trial, and referred to matters transpiring long subsequent to any of such issues, which objection was by the Court overruled, and to which ruling the respondents by their counsel duly excepted, and which exception was by the Court allowed.

The instrument was thereupon received in evidence, being interveners Exhibit No. 39, a written notice by a committee of holders of bonds secured by the mortgage to the plaintiff of the default of the Idaho-Oregon Light & Power Company in failing to pay interest due April 1st, 1913, upon said bonds, and a request upon the Trustee to foreclose the said mortgage on account of said default.

WHEREFORE, the said respondents (appellants here) hereinabove named, pray that said decree be reversed and the District Court directed to dismiss the bill in intervention of the interveners, A. W. Priest, et al., and to render such decree as shall be meet and just.

BRIEF OF ARGUMENT.

POINTS.

The Specifications of Error may be grouped under the following points which will be used as main heads in the development of the argument.

I.

The interveners have no standing in Court to litigate the questions involved nor legal interest in their determination, because—

1. The contracts in question were voidable and not void.

2. The bondholders had received their consideration under the mortgage when the bonds were certified and cannot complain of their subsequent disposition.

3. The bill is essentially a stockholders or general creditors bill (their claims having been reduced to judgment) and cannot be maintained because:

(a) The interveners are neither stockholders or creditors.

(b) Assuming them to belong to the latter class, or to have rights equal with such creditors, there is nothing to show their status as creditors when the acts complained of were committed, and the record affirmatively shows that the creditors of that class were not prejudiced by the transaction.

These questions are primarily presented by Specifications or Error I and XXII, but are involved incidentally, in that the decree awarded the bondholders the relief which they sought, by Specifications of Error II, VI, X, XIII, XV, XIX, and XXI.

II.

Under the conditions prevailing, the transactions were not fraudulent nor subject to avoidance in the manner here attempted by stockholders or general creditors, nor was any person legally or morally injured thereby.

Under this point we consider particularly:

- (1) The transaction of September 25th.
- (2) The transaction of December 27th.

As to

- (a) First mortgage bondholders.
- (b) Second mortgage bondholders.
- (c) General creditors.

(d) Stockholders.

(e) Receiver.

This point is raised by Specifications II, V, VI, X, XIII, XIV, XVII, XVIII, XIX and XXI, wherein the general validity of the questioned transactions is asserted.

III.

The transactions merely awarded the appellants, as holders of second mortgage bonds, reimbursement to the extent that they were entitled thereto by their expenditures contributing to the common security.

This proposition is in aid of the Specifications of Error involved under the preceding point, and is merely an affirmative argument in support of the proposition there asserted.

IV.

Assuming the invalidity of the transactions, the appellants should have been decreed to be the owners of the bonds to the full extent of the consideration they gave therefor, and should therefore have been awarded a lien against the entire 718 bonds, for

(1) The \$250,000 cash advanced with interest.

(2) The value of the second mortgage bonds

(3) The extent of the commitment to Bates & Rogers.

(4) The value of the stock of the Railway Company.

This proposition is asserted by Specifications of Error III, IV, XVI, XX, and was recognized by the Court in its decision, but complaint is made of the limited extent of the reimbursement allowed .

V.

Evidence as to the financial history and situation of the Power and Railway Companies was not relevant to the issues and should have been excluded.

The specific complaints made are presented by Specifications of Error XXIII to XXX, inclusive. These will require but brief mention.

I.

The Interveners Have No Standing To Litigate The Questions Involved.

The question involved in this case is the validity of the disposal by the Power Company of bonds admittedly properly certified and delivered to the Company under the terms of the mortgage, to reimburse the Company for expenditures made by it from its earnings and the proceeds of the second mortgage bonds, and which might lawfully have been made in the first instance from the proceeds of the first mortgage bonds, as against the holders of other first mortgage bonds, for whose benefit such expenditures were made. Bonds thus obtained by the Company were exchanged for second mortgage bonds validly outstanding in the hands of the Railway Company, the proceeds of which in large measure had gone to make up the expenditures for which the Power Company was entitled to such reimbursement.

No question is made of over certification or fraudulent or illegal certification, but it is claimed in substance that the bonds so given in exchange are not entitled to participate in the proceeds of sale because the transactions were not formally authorized by the Board of Directors or Executive Committee of the Power Company; that if so authorized, such Board of Directors and Executive Committee consisted of the same persons comprising the like board and committee of the Railway Company, and that the transaction was a fraud upon the Power Company and its creditors including the pre-existing first mortgage bondholders. We proceed to a discussion of these questions.

1. *The Contracts Were At Most Voidable And Not Void.*

If the contracts be regarded as constructively fraudulent because of the identity of the agents of the two contracting parties, or actually fraudulent (and we cannot see how they can be regarded as actually fraudulent if the parties were acting at arms' length) they are voidable and not void. This being true they are good as against everybody but the contracting party prejudiced thereby, and if he is content therewith no third person can ignore the contract or set it aside.

The questions which the interveners seek to litigate here are, first, whether the contracts were properly authorized. That is, whether, as to the contract of September 25th, a majority of the quorum

of the Board of Directors voted for the contract, and, as to the transaction of December 27th, whether the Executive Committee, or any competent authority, ever even purported to authorize the same.

We pass the direct answers to these propositions, first, that the lower court did not determine this phase of the question, but assumed the contracts to be properly authorized; second, that the interveners failed to overcome the *prima facie* case made by the minutes and supporting testimony on these points; third, that the vital transaction of September 25th was admittedly authorized by unanimous vote; fourth, that the contracts were regularly and formally executed under the corporate seals of the companies and presumptively authorized; fifth, that whether formally authorized or not they were fully carried out and executed, and, assuming that the Company could have set the contracts aside while they remained executory, or within a reasonable time after they had been carried out, it could not now do so, and we ask by what right could the bondholders complain of the lack of authority of the corporate officers to make these contracts, assuming, now, that there is no other objection thereto. If the Company is satisfied and acquiesces in the situation and in the acts of its agents, the bondholders, so far as this feature of the case is concerned, have no right to interfere. Certainly excess of authority by an agent affords no ground of complaint to any other person than the principal.

The remaining ground upon which the contracts

are to be set aside upon the interveners' contention is that the companies had common Boards of Directors who could not, therefore, contract with themselves. This would only be true were the contracts for that reason void, and not merely voidable. Although the terms are loosely used in the books as interchangeable, yet there is a clear legal distinction, in that if the transactions were void they are as though they had never been. If merely voidable, they are binding until set aside by a party entitled to avoid them, in this case, the corporation. If the contracts are merely voidable, then the question here raised by the interveners is substantially the same as the question last above discussed.

Let us then consider whether contracts between companies having common Boards of Directors are void or merely voidable.

It is generally held, by the Federal Courts at least, and the most of the State Courts, that transactions between companies, having common Boards of Directors, are not thereby rendered void, nor are they even presumptively fraudulent, but such transactions are voidable, if in fact unfair, at the instance of the company defrauded, or its stockholders, but they are not void and until avoided by parties entitled to avoid the same they will be recognized. It is further held that such transactions, even if otherwise voidable, are subject to ratification and that the performance of such contracts by both parties, and acquiescence therein by them, constitutes a ratification and precludes their subsequent avoidance.

The case most frequently cited to this point as the ruling case is *Oil Company v. Marbury*, 91 U. S. 587; 23 L. Ed. 328.

In discussing the general principles covering contracts of this character, the Court said:

“The first question which arises on this state of facts is whether defendant’s purchase was absolutely void.”

“The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the parties whose interest has been so represented by the party claiming under it. We say this is the general rule; for there may be cases where such contracts would be void *ab initio*; as when an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. *But even here, acts which amount to a ratification by the principal may validate the sale.*”

* * * *

“*If he should be a sole director, or one of a smaller number vested with certain powers this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness. All this falls far short, however, of holding that no such contract can be made which will be valid.*”

* * * *

“In this class of cases the party is bound to act with reasonable diligence as soon as the fraud is discovered, or his right to rescind is gone. No delay, for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain or rescind it, is allowed in a court of equity.”

More nearly in point—that is, on the interveners’ theory that the transaction is fraudulent—is *Thomas v. Brownsville R. Co.*, 109 U. S. 522, cited to another point *infra*. There it was held that bonds issued under a fraudulent construction contract to a company having the same directors as the Railway Company was not void but merely voidable at the election of the parties affected by the fraud, and could be ratified or avoided by them.

In *Jesup v. Illinois Central R. Co.*, 43 Fed. 483, Mr. Justice Harlan, sitting in Circuit, said:

(Quoting from page 503.)

“The fundamental error in the argument for the Dubuque Company is in the assumption that the lease was absolutely void by reason of Jessup and other directors, who were interested in the Cedar Falls Company, having participated in the making of it. We have already indicated that, so far as the lease depended upon the action of the board of directors, its technical validity was placed beyond question by the approval

of the majority of the directors, no one of whom then or ever had, so far as the record shows, any interest in the Cedar Falls Company. But to avoid misapprehension it is well to say that, in the judgment of the court, the lease would not have been void, even if a majority of the directors of the Dubuque Company occupied the same relations to the Cedar Falls Company that Jessup, James, Frost and Smith did when the lease was made. It would, at most, have been simply voidable at the election of the Dubuque Company, or, in a proper case, at the suit of its stockholders, and that election must have been exercised, or the suit brought, within such time as was reasonable, taking into consideration all the facts and circumstances of the case, including the nature of the property that was the subject of the lease."

In *Robinson v. M'Cracken*, 52 Fed., 726, it is said:

"But, assuming the existence of Mason's character as a stockholder, and that an exorbitant contract of the entire body of stockholders for their own pecuniary benefit can be seasonably attacked by existing creditors, it is well settled that, as a general rule, contracts of a corporation, which were made by directors who obtained a personal pecuniary benefit thereby, are not, on that account alone, void, but are voidable at the election of the parties who are affected by the fraud. This is clearly announced in *Barnes*

v. Brown, 80 N. Y. 527; Barr v. Railroad Co., 125 N. Y. 263; 26 N. E. Rep. 145; Oil Co. v. Marbury, 91 U. S. 587; and Thomas v. Railroad Co., 109 U. S. 522; 3 Sup. Ct. Rep. 315. In the latter case it is said, in substance, that those for whom the agent was acting have the option to avoid such a contract, but until they exercise their option, and seasonably show that it is their purpose not to submit to the act of the agent, the contract is in existence, and is not a nullity."

See also, *Coe v. East R. Co.*, 52 Fed. 531.

A strong case is that of Barr v. New York R. Co., 26 N. E. 145. The syllabus is as follows:

"1. In order to construct a connecting line for a railway company, a new company was organized, some of the directors and incorporators being directors of the old company. The new company made an agreement for the construction of its road, whereby it was to issue to the contractor \$1,000,000 of 7 per cent bonds, and \$500,000 of capital stock, being all the bonds and stock of the company. The contractor was a mere figurehead representing a syndicate of the directors and assigned both the securities and the contract to them. The actual cost of constructing the road was \$850,000, and after completion it was leased to the old company which agreed to pay a rental equal to 30 per cent of the new road's gross earnings, and guaranteed that such sum should never be less than \$105,000

per annum, or 7 per cent on the total issue of bonds and stock. Held, that, while the lease was made in pursuance of a corrupt scheme to impose upon the old company an obligation for the benefit of some of its own directors, yet it was merely voidable, and not void."

The Court, among other things, said:

"The question which is raised by the defense to the action is whether the fraudulent nature of the acts and proceedings, by which the railroad was constructed, and the contract of lease effected, are matters which have reached in their vice so far as, at this day, to disable the plaintiffs from enforcing against the lessee of their company the payment of the full amount of rental stipulated for in the lease. I cannot think that such is the result, or that the law intends such consequences to attach, as the respondent claims, and as the courts below have held. There is something repugnant to our sense of justice, and a seeming subversion of ideas respecting property rights, in the position that property may be retained and enjoyed, and payment of the stipulated rental therefor refused by its holder, on the plea of fraudulent practices, or because of the immoral conduct involved in the making of the contract by which the property was transferred, and the obligation to pay imposed. We would naturally reason that these considerations furnished grounds for repudiating a transaction so tainted, and for re-

fusing to remain under the obligation to keep and pay for the use of the property; but our reason fails to make it evident how, with knowledge of the fraud or immorality practiced, and with opportunity to act in repudiation, the party may retain possession and enjoy the advantages which possession gives, and, nevertheless, refuse the payment which was the condition of the right to its possession and use. Fraud furnishes ground for rescinding a contract, and for avoiding an obligation imposed, but I do not understand that, while serving to divest the obligation, it can be availed of as a means of continuing the possession of the property which the contract, legal in itself, was designed to and did transfer."

See also *Kelley v. Newburyport R. Co.*, 6 N. E. (Mass.) 745; *Nye v. Storer*, 46 N. E. (Mass.) 402.

See also *San Diego R. Co. v. Pacific Beach Co.*, 33 L. R. A. (Cal.) 788, and note.

A case somewhat in point on the general features of this case and in answer to contentions which are made on the argument is *Leavenworth v. Chicago R. Co.*, 134 U. S. 688; 33 L. Ed. 1064.

There it was held that the fact that some of the trustees in a railroad mortgage were directors in another railroad company which procured the foreclosure of the mortgage, that one person was president of both companies, and a majority of the direc-

tors of both were the same persons, and a majority of the stock of the mortgagor was in the hands of the president of the other company, and that the attorneys were, or had been, attorneys for both companies, were not sufficient, in the absence of actual fraud, to render the foreclosure void. It was held in effect that it would have to be shown, to defeat the foreclosure, that the mortgagor company did not owe the interest or that the means were on hand to pay it, and the fact was suppressed or concealed by collusion between the companies.

On the question of ratification by the stockholders of a transaction voidable because of the existence of a common board of directors, see *San Diego Co. v. Pacific Beach Co. supra*, where the Court said:

“The contract, therefore, was not void; and assuming that it was voidable, and might have been avoided by the appellant at the proper time and in the proper manner, it is clear that it was not so avoided, but that it was ratified. In the first place there was no attempt to avoid it, nor any intimation of such intention, until long after the time mentioned in the contract had expired, and respondent had performed all its covenants therein provided, until long after appellant had received all the benefits coming to it from respondent’s performance, and until long after it had become impossible to restore anything to respondent, or to put it, in whole or in part, in *statu quo*. And during this time appellant without objection paid, from time to time, the greater

part of the principal and a large part of the interest which by the contract it had promised to pay; thus inducing respondent to perform the whole of its part of the contract in confidence that appellant would do the same. This, we think, under the circumstances of this case, constitutes ratification by acquiescence; for the rule is that a party cannot repudiate the burdens of a contract while enjoying its benefits."

Whatever view the court may take as to the propriety of this inter-corporate action, in view of the relations of the directors to both companies, neither the corporation, nor its stockholders, are here seeking to avoid the transaction. The interveners, as bondholders, are attacking it as a fraud by the company upon their rights, and the company has been called upon to defend and is defending it. There is no privity of relationship between the bondholders and the company or its stockholders by which the former are entitled to make this attack.

This point is substantially decided in *Mining Co. v. Coosa Furnace Co.*, 95 Ala. 614; 36 Am. St. Rep 251, where the Court said:

"But the duty which disqualifies the directors from binding the corporation by a transaction in which they have an adverse interest, is one owing to the corporation which they represent, and to the stockholders thereof. A principal may consent to be bound by a contract made for him by an agent who, at the same time,

represented an interest adverse to that of the principal. A *cestui que* trust may elect to confirm a transaction which he could have repudiated on the ground that the trustee had an interest in the matter not consistent with his trust relation. In like manner, dealings between corporations, represented by the same persons as directors, may be accepted as binding by each corporation and the stockholders thereof. The general rule, is that such dealings are not absolutely void, but are voidable at the election of the respective corporations, or of the stockholders thereof. They become binding, if acquiesced in by the corporations and their stockholders.

* * * * *

“The directors of a corporation, in the transaction of its business and the disposition of its property, do not stand in any such relation to the general creditors of the corporation as they occupy to the corporation itself and to its stockholders. They are not the agents of such creditors, nor can they usually be regarded as trustees acting in their behalf. The creditors are not entitled to disaffirm a transfer of the property of the corporation, made by its directors or other agents, merely because the corporation itself or its stockholders could have done so. When a disposition of the property of a corporation is assailed by its creditors, they are not clothed with the right of the corporation or of its stockholders to set aside the transaction, re-

gardless of its fairness or unfairness, on the ground that it was entered into by representatives of the corporation who had put themselves in a relation antagonistic to the interests of their principal. The right of the creditor to impeach the transaction depends upon its fraudulent character. The question in such case is, Was the transaction which is complained of entered into with the intent to hinder, delay or defraud creditors?"

A bondholder is in no better position than a creditor in this respect. By the bill in this case it is claimed in effect that the responsible officers of the Power Company, being interested in the Railway Company, perpetrated, for the interest of the latter, a fraud upon the former, but there is no trust relationship between those officers and the bondholders such as to entitle them to maintain their bill.

In *Van Weel v. Winston*, 115 U. S. 228; 29 L. Ed. 384, it was held that bondholders under a railroad mortgage could not maintain a bill against the President of the Company and the Railway Company on account of fraudulent conversion by the President of the proceeds of bonds. The Court said:

"Other transactions are mentioned as fraudulent, such as that Mr. Winston converted some of the money arising from these bonds to private use, and not to the purpose of the Company. The answer to this is, that Mr. Winston came under no obligation to see to the application of

this money as the bondholders might think it ought to be applied. They had bought their bonds, paid their money, and received their security. The money so diverted was the money of the Southwestern Company and not their money.

“The wrong done by Winston in that matter, if wrong there was, was done to that company and not to the bondholders. They had provided their own means of insuring the building of this branch road, by disbursing the money through the Rock Island Company, and it was successful. The road was built. There was no privity between Mr. Winston and these bondholders as to his use of money which they had loaned to the Company, which was no longer their money. The error which pervades the bill throughout is to treat this corporation, to which the bondholders loaned their money, as if it had no existence, as if they had loaned it to Mr. Winston and held his personal obligation that it should all be honestly applied, and he be responsible for the repayment of the loan. If Mr. Winston cheated this company out of its money, the right to redress for that wrong is in the company or in its stockholders. As a creditor of the Company, Mr. Van Weel has no right to interfere in the matter until he had a judgment against the company, with an execution returned *nulla bona*. He has not in this suit shown any right to use the name of the Company or of its stockholders to obtain redress for a tort committed on them.”

Substantially similar, but possibly a stronger case is that of the *United States v. Union Pacific R. Company*, 98 U. S. 569; 25 L. Ed. 143, where it was held that the United States, as a holder of the securities of the Union Pacific Railway Company, had no right to enforce rights of the corporation against its controlling stockholders and directors, who, it was alleged, had profited at the expense of the corporation by illegal acts. It was said that the right of such action was solely in the corporation, and that it could not be made to bring the same against its will by the United States as a bondholder, or by virtue of any other right which the Government had in the property, even though the corporation was so corruptly dominated by those guilty of illegal acts, that it would not seek the relief to which it was entitled.

The case is of peculiar interest in connection with the case of *Wardell v. Union Pacific Railroad*, 4 Dillon 339, affirmed 103 U. S. 651; 26 Law Ed. 509, as in the latter case the stockholders successfully maintained a bill to set aside the very transactions complained of by the United States as a bondholder in the former case.

The only responsive argument which can be made to this position is that because the Boards of Directors of the two companies were the same it was impossible for the Power Company to repudiate the transaction, and that since the Railway Company owned very nearly all the capital stock of the Power Company it was practically impossible that any

stockholder should act for that purpose in its behalf. Should this argument be advanced the obvious reply is that it proves too much, namely, that those directly concerned in the transaction were the only ones interested, and accordingly that, since it appealed to them as a wise and proper thing to do, no cause of complaint devolves upon any other person.

We are not here considering any question of actual fraud as against bondholders or creditors, but simply the question of constructive fraud inferred from the personal identity of the Boards of Directors of the two companies, and the fact that in the sequel at least the transaction was presumably profitable to the Railway Company.

2. *The bondholders have received the consideration for which they contracted and are in no position to complain.*

It has already been shown in the statement that the mortgage securing the bonds held by the plaintiffs, as well as by the respondents, was an open one authorizing the present issue of \$500,000 of bonds and future issues under specified terms and conditions. Approximately \$2,500,000 of these bonds were outstanding in the hands of interveners and other bondholders, at the time of the execution of the second mortgage. There were at that time certified and in the treasury of the Company, approximately \$305,000 additional bonds under the plaintiff's mortgage, and there have since been certified the balance of the bonds, about \$413,000, making

up the disputed issues in the hands of the respondents. (Statement, *ante* pp. 24-26).

The bonds issued under the mortgage each recited:

“This bond is one of a series of seven thousand * * * amounting in the aggregate to \$7,000,000, the payment of all which bonds, with interest as aforesaid, is equally and ratably, and without preference of one bond over another, secured by a trust deed or mortgage duly executed and delivered to the State Bank of Chicago.” (Record, p. 384).

The mortgage provided that the conveyance of the property to the Trustee should be:

“In trust, however, for the equal and proportionate benefit and security of all present and future holders of bonds and coupons to be issued under and secured by this indenture * * * without preference, priority or distinction as to lien or otherwise of any bond over any other bond by reason of priority in the issue or the negotiation thereof, so that each and every bond issued and to be issued as aforesaid, shall have the same right, lien and privilege under this indenture, and so that the principal and interest of every such bond shall, subject to the terms hereof, be equally and proportionately secured hereby as if all had been made, executed, delivered and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of this indenture shall take

effect from the day of the date hereof, without regard to the date of actual issue, sale or distribution of said bonds, and as though upon the day of such date all of said bonds had been actually issued, sold and delivered to, and were in the hands of, innocent holders for value." (Statement, *ante* pp. 22,23).

The bonds other than the original \$500,000 immediately certified and delivered to the Company, were held by the Trustee to be certified upon certain terms and conditions, for (a) the retirement of prior lien bonds, (b) in purchase of other property, and (c) to reimburse the company for expenditures made by it in plant additions and construction. (Statement, *ante* p. 24). It is not disputed that the Company has made the expenditures for these purposes which were necessary to entitle it to draw down these disputed bonds, as well as all the other bonds held by the interveners and other bondholders, from the Trustee, nor that such bonds were validly held by the Company as ^{Debtors} assets in its treasury for issue or sale at the best price obtainable for the corporate purposes of the Company. (Statement, *ante* pp. 25, 26).

Under these circumstances we contend that holders of other bonds are not entitled to question the use to which these bonds were put by the Company, nor the consideration received by the Company in their sale, since they (the bondholders) have received the consideration for which they contracted

when they took their bonds, in the enhancement in value or enlargement of the Company's plant. The consequent liability of their bonds to be cut down on distribution by *pro rating* with other bonds is one of the conditions with which their bonds were burdened when they took them. The pertinent clauses of the mortgage have been quoted or referred to, and it seems entirely clear that so far as the bondholder is concerned, if the Company received in betterments or additions the values required by the mortgage, it has fulfilled the contract which it made with its bondholders, and by which it became entitled as against them to the additional bonds, to use as it saw fit for any legitimate corporate purposes. The Company is the judge of such purposes, and of the values which it receives on issuing the bonds to purchasers.

To illustrate, if the Company had made these improvements or betterments from earnings, many of which it doubtless did make from such source, it had the right, on funding the expenditures thus made by taking down bonds for its reimbursement, to pay the proceeds of such bonds in dividends to its stockholders, or the proceeds of such bonds could have been used in paying operating expenses, funding floating debts, taking up junior securities, or any other corporate purpose. In fact all these uses are usual ones of ordinary occurrence.

So in this case these expenditures were ones in the first instance which could have been paid for in bonds of this series, and the bondholder is in no way damaged by paying for the expenditures, first out

of other funds, and then reimbursing the latter funds from the proceeds of these bonds. The bondholder is entitled to one accounting of the expenditures, for the purpose for which his bonds are issued; he is not entitled to two accountings; he is protected to the extent that there must be an equivalence between the expenditures on plant account made by the Company, and the bonds issued by it, so that the bonds shall be secured by property of equivalent value but to use a homely saying, he is not entitled to have his cake and eat it, too. He can prevent the issuance of, or repudiate, bonds to which the Company is not entitled, but he cannot, in the absence of appropriate covenants in the mortgage, follow the proceeds or direct the manner of use of the bonds to which it is entitled.

There seem to be very few authorities in point, the cases involving the validity of holdings of corporate bonds, generally fall within the following classes: 1. Bonds illegally issued, without, or in excess of statutory authority. 2. Bonds issued in violation of the provisions of the mortgage such as fraudulent certifications or over-issues. 3. Bonds issued at discount or with stock bonus. 4. Bonds issued or disposed of in violation of covenants limiting their issue or restricting the use of the proceeds. 5. The validity of, or amount at which, bonds may be proved against a defendant Company.

None of these cases are of value in this connection although some of them may be referred to under later headings of the brief. The only cases which

throw any light on the subject here involved, which we have been able to find are the following:

In *Beech Creek Company v. Knickerbocker Trust Company*, 111 N. Y. Supp. 1030, application was made by plaintiff for the certification of bonds reserved under its mortgage for the retirement of underlying bonds. It appeared that the Company had obtained twelve thousand of its underlying bonds from its general funds, and demanded reimbursement therefor from the Trustee. The Court said:

“Nothing can be clearer therefore, than that the intention and agreement was that the reserved \$252,000 of bonds were to be issued as fast as the bonds under the earlier mortgage were presented for cancellation, so that in the end there should be none of the latter bonds outstanding, but all of the bonds under the later mortgage should have been issued. How the Coal Company procured the bonds of the earlier issue which it presented for cancellation was no concern of the holders of bonds under the later mortgage, nor of the trustees under that mortgage. It was and is immaterial whether the Coal Company purchased the bonds by means of the sinking fund, or by the use of its surplus earnings, or by the sale of bonds to be issued under the later and larger mortgage. All that the holders of these latter bonds were concerned with was that there should not be outstanding at any time more than \$3,000,000 of bonds, in-

cluding those issued under the earlier, as well as those issued under the later, mortgage.”

A similar case is that of *Twin State Gas Company v. Knickerbocker Trust Company*, 120 N. Y. Supp. 764. This action was likewise brought to compel the trustee to certify refunding bonds to reimburse the Company for its expenses in retiring underlying bonds. The Court granted the relief, saying:

“The purpose of the mortgage to the defendant was not to reduce the indebtedness of the *Twin State Gas & Electric Company*, but to substitute a single indebtedness for all the different classes of indebtedness of the company; indeed, one of the purposes recited in the mortgage is “to fund the indebtedness” secured by the underlying mortgages. The word “funding” as thus used, has a well-defined and definite meaning, viz: “the process of collecting together a variety of outstanding debts” against a corporation, payable at short periods, and substituting therefor a single form of indebtedness “payable at periods comparatively remote.” *Ketchum v. City of Buffalo and Austin*, 14 N. Y. 356; *People v. Carpenter*, 31 App. Div. 603, 52 N. Y. Supp. 781.

“It is no concern of the defendant, therefore, when the plaintiff presents underlying bonds in exchange for refunding bonds, whether the underlying bonds have been canceled or not, or how the plaintiff obtained possession of them. All it has to do is to see that the bonds presented are underlying bonds. All that the holders of the

bonds given by the mortgage to the defendant are interested in is that there shall not be outstanding at any time more than \$1,500,000 of bonds, including those issued under this mortgage, as well as those issued under the prior mortgages."

A similar ruling was made in the case of *Charleston Illuminating Company v. Knickerbocker Trust Company*, 122 N. Y. Supp. 994.

A discussion of the right of the company to have authenticated and delivered to it bonds to reimburse it for construction expenditures appears in *Pittsburg R. Company v. Central Trust Company*, 141 N. Y. Supp. 66. There it was held that the Company was entitled to such reimbursement regardless of whether or not the work was done before or after the execution of the mortgage. The decision is of no particular importance as it is confined to construction of terms of the particular mortgage. It is cited simply as illustrative of the practice of corporations to reimburse themselves for capital expenditures against the mortgage bondholders.

The case most nearly in point is *Atwood v. Shenandoah R. Co.*, 85 Va. 966-978.

In this case it appeared that a railroad company had executed a mortgage limiting the amount of bonds which might be issued thereunder to \$15,000 a mile. It later appeared that the road could not be completed for this sum and certain extensions were deemed desirable to put it on an operating basis. Therefore, a general mortgage was created authorizing an issue of bonds up to \$25,000 a mile,

subordinate to the former mortgage, but to strengthen the security of the second mortgage bonds, the company caused to be certified and delivered all the additional bonds which could be obtained under the first mortgage for the proposed construction on the basis of \$15,000 per mile, and pledged such bonds as collateral security for its second mortgage bonds. In upholding this transaction and denying the first mortgage bondholders the right to attack the same, the Court said:

“It is not perceived that the railroad company, in thus pledging these fifteen hundred and sixty first mortgage bonds as security for the benefit of the general mortgage bondholders, did any injustice to or violated any contract right of the first mortgage bondholders. Acting under its charter, which authorized the extension of the road, the railroad company executed the first mortgage of April 1, 1880, to secure its bonds to an extent not exceeding \$15,000 per mile of road then or thereafter to be completed. The road has been extended and completed, and bonds at the rate of \$15,000 per mile, and no more, have been issued under and in pursuance of the terms of the first mortgage, the \$2,270,000 of bonds, held by the first mortgage bondholders, and the \$1,560,000 of extension bonds issued thereunder and pledged for the security of the general mortgage bondholders, together make the aggregate of \$3,830,000 at \$15,000 per mile of the line of road actually constructed.

“The proceeds of the bonds held by the first mortgage bondholders were expended entirely on the construction of that part of the road north of Waynesboro, not a dollar thereof having been expended south of that point; while the extension south of Waynesboro was built exclusively with funds derived under the general mortgage. Yet the first mortgage bondholders claim a lien over the entire line of road prior and superior to that of the general mortgage bondholders. The claim is preposterous. It is true that the general mortgage was made expressly subject to the first mortgage, but, be it observed, it is subject not to the rights of the present first mortgage bondholders merely, but to all the rights secured by the first mortgage, prominent among which is the right to issue and use the additional bonds here in controversy.

“Both lots of bonds were issued in virtue of one and the same authority, under the same mortgage, about the same time, and for the same purpose. Hence the rights of the first mortgage bondholders, as respects the fifteen hundred and sixty extension bonds, are precisely the same as those of the general mortgage bondholders; the second stand together as first lienors.

“Though these fifteen hundred and sixty first mortgage bonds issued and deposited as collateral for the general mortgage bonds be held to be valid securities under the general mortgage, and they certainly are such, how does that fact im-

pair in any way the contract rights of the first mortgage bondholders? Both lots of bonds were issued under and in exact pursuance of the first mortgage, and if one fails, the other must necessarily fail also—if one is not entitled to the footing of first lien, the other can have no claim to such a position. Suppose the railroad company had issued those bonds and put them on the market for the purpose of securing funds with which to aid the construction of the extension of its road, and it undoubtedly had the right to do so, in what worse position would the first bondholders be placed than they are by the application of them as strengthening plaster—as a first lien backing and support to the general mortgage bonds? It is certain that they would be in the same relative position now held by them, and that is the position of their own choosing.”

(Quoted from pages 986-7.)

The transaction was further attacked on the ground that the banking firm which took the general mortgage bonds were the financial agents of the Railway Company, and two members of the same were officers and directors of the Railway Company. The Court, commenting on this phase of the case, said, after stating that their actions would not violate any fiduciary relations:

“On the contrary, they simply lent their money to the Railroad Company upon the terms prescribed by it, as any stranger might do, and took the security for the payment thereof pledged un-

der the general mortgage, and against this there is no bar in either law or morals. It cannot be maintained that the rule in question, or any rule, forbids a dealing of this character—nor has any case gone to the unreasonable extent of so holding. See note to *Fox v. Marretta*, 1 Lea. Cas. Eq. p. 237; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Hotel Company v. Wade*, 97 U. S. 75.

“In the last named case it was said: But where stockholders sanction a contract under which directors loan money to the corporation, and its bonds, secured by mortgage, are given, if the money is properly applied, the corporation is estopped from setting up that the bonds and mortgage are void by reason of the trust relations which directors sustained to it. Here the Railroad Company not only obtained the loan on the terms dictated by it, but received the cash and actually expended it in the construction of the extension of its road. Could there be any higher sanction than this? We think not. It would be an almost barbarous rule that would forbid a transaction of this character, and one that would at least hazard the undoing of all the common transactions of mankind.

“Even in the cases when the equitable principle in question is given its widest sweep, the general rule is that the contract may be avoided at the election of the stockholders, or *cestui que trust*, upon the terms of restoring what the trustee or agent has parted with in the transaction.”

In *Weed v. Gainesville R. Co.*, 119 Ga. 576, holders of \$83,500.00 of bonds secured by a mortgage covering \$245,000.00 of bonds attempted to attack on foreclosure the rights of the holders of the remaining \$161,500.00 of bonds on the ground that the contract by which they were issued sold them at 90 and gave as a bonus therefor \$130,000.00 of capital stock fully paid up, these bonds and this stock being issued for the purpose of completing the railroad, and it being claimed in addition to the manner of the issuance of the bonds that the completion of the road in the manner contemplated violated a state statute as to competing railroads. The Court said, page 590:

“The construction of the Gainesville Railroad did not lessen or increase, but created competition where none previously existed. But if the geographical situation or character of business transacted had made the Georgia and the Gainesville competing roads, the state, the stockholders, or the parties alone could have attacked the contract of March 31, 1883, as being *ultra vires*, or in restraint of trade. Bondholders are not authorized to act as guardians for the public or the parties, in having such a contract set aside or declared to have been illegal; certainly not in a case where the bondholder prays that the subscriber to the stock under such contract be held liable for the unpaid subscription.”

Keystone National Bank v. Palos Coal Company, 43 So. 570. Bill was brought by a bondholder for

the benefit of himself and all other bondholders, as well as for general creditors for the annulment of certain mortgage bonds held by certain of the defendants on the ground that they were illegally disposed of by the company. The Court said:

“While the bill prays specifically for the ‘annulment’ of certain bonds held by the respondents, the relief sought in this respect is inappropriate to the facts stated in the bill. The bond issue was for corporate purposes and benefits, and was made under corporate authority, and it is not pretended, in so far as shown by the facts stated in the bill, that there was any illegality in the issue of the bonds. The facts stated tend to show, not an illegal issue, but rather an illegal disposition of the bonds after the same had been legally issued. If the bonds were ‘hypothecated’ without consideration, and in this manner parted with and disposed of, this would be a corporate wrong. The remedy in such a case, it would seem, would not be the ‘annulment’ of the bonds, but a restoration of the bonds to the rightful custodian, and the relief should be sought and had in the name of the corporation.”

The bill was accordingly dismissed.

See also *Van Weel v. Winston*, *supra*.

It cannot be argued that the execution of the second mortgage, or the issue of bonds thereunder, prevented further issues under the first mortgage, or any way subordinated the subsequent issues under

that mortgage. It is probably enough, in this connection, to call attention to the language of the second mortgage which has already been quoted, by which it is expressly made subject to all bonds, "Now issued or hereafter to be issued," under the first mortgage. (Record, p. 241.) Under such conditions it has been uniformly held that further issues may be made under the first mortgage, and that the bonds so issued are of equal rank with the remaining first mortgage bonds, and are prior to all issues under the second mortgage, whether earlier or later in time.

The leading case on this point is *Claflin v. South Carolina R. Company*, 8 Fed. 118. The opinion is by Chief Justice Waite. There it was held that first mortgage bonds, whether unissued in the hands of the company at the time of the execution of the mortgage or afterwards acquired by it, could be issued and reissued after the execution of the second mortgage, so as to carry with them the lien of the first mortgage as against the second. The Court said among other things:

"The mortgage is not to the unsecured bondholders, or floating-debt holders, or to trustees for their security. It was made to secure bonds, the proceeds of which were to be applied to extinguish the one class of debts and retire the other. The mode in which this was to be done is not provided for. All that is left to the discretion of the company or its officers. No creditor can demand the bonds upon such terms as

he may dictate. He must submit to what the Company requires, or get no advantage from what has been done. His specific rights under the mortgage all depend on the bargain he makes with the Company in that behalf. He may, if the Company consents, exchange his claim for bonds, dollar for dollar, or less, or more; but until some arrangement has been made by which a bond secured by the mortgage becomes in some way connected with the unsecured bonds he owns, or the part of the floating debt he holds, he remains just where he was before the mortgage was made."

It further appeared in the case that unsecured bonds were afterwards exchanged for secured ones under the mortgage, and in some cases notes were given to the unsecured bondholders, which were secured by collateral pledges of the second mortgage bonds. As to this the Court said:

"The old bonds have been retired by the use of the new. There was no actual exchange of bonds, but the new bonds were put in the way of being applied to pay for the old ones. All this, as it seems to me, is within the scope of the mortgage. It may not have been judicious management, but it was within the discretion of the company. The only contract with the individual bondholders is that the mortgage security shall not be diverted from its designated uses. That bonds sold under a pledge to secure an old debt

carry with them the mortgage, cannot, as I think, admit of a doubt."

With respect to the issuance of first mortgage bonds after the execution of the second mortgage, the Court said:

"The second mortgagees voluntarily permitted the first mortgage to stand as it was. In this the second mortgage bondholders are represented and bound by their trustees. Whatever the Company could do with the first bonds before, it might do after, so far as any express limitations in the second mortgage were concerned. The lien of the first to its full amount was recognized, and nothing was said or done showing directly any intention to limit the power of the Company under it. Suppose, instead of a mortgage to secure bonds, it had been, under full legislative authority to that purpose, to secure a certain amount and description of notes, like bank-notes, to be put in circulation as money. Would any one insist that, if a subsequent mortgage should be given on the same property, which was in terms subject to the lien of the first, the Company would in this way be prevented from keeping its old notes in circulation, and taking them in and paying them out as before? Clearly not, I think. And why? Because the nature of the paper secured was such as to preclude such an idea. The notes were put out for circulation. They were to be used as money. When in the possession of the company they were for the time

being inoperative, but as soon as they were out their attributes as notes secured by the mortgage were restored. Such would have been the evident intent of the parties, and such, I am sure, is the effect the courts would give to what had been done.

“Here the bonds put out, while not for circulation as money, were intended as articles of commerce, to be bought and sold in the market, and passed from hand to hand as current negotiable securities. They were to be used in trade. When in the hands of the company their lien under the mortgage was suspended; but the moment they were out in the usual course of business, it again took effect as of the time the mortgage was given. Any other rule than this would materially impair the marketable value of this class of instruments, and tend to defeat the very object of their execution. The whole issue of such bonds must be treated as of the date of the mortgage, without regard to the time they were actually put out, unless the contrary is clearly expressed.”

It is clear from all the cases discussing this subject that for the bondholder to maintain such a bill as is here attempted the bonds must have been issued in violation of some covenant of the mortgage restricting the issue, or directing the application of the proceeds thereof. Such a case is *McMurray v. Moran*, 134 U. S. 150; 33 L. Ed. 814.

The famous Hocking Valley litigation, which fin-

ally terminated in the decision of the New York Court of Appeals in the case of *Belden v. Burke*, 42 N. E. 261, is likewise illustrative of this principle. There there was an express covenant as to the use to which the proceeds of the bonds were to be put. It was held that bondholders that did not know of or rely upon such covenant could not maintain an action for the diversion of the proceeds of the bonds, and to enforce the covenant by compelling reimbursement of the funds so diverted. It was clearly assumed throughout the whole case that were it not for such covenant the bondholders would have no standing, and the whole question was whether or not the plaintiff was entitled to enforce such covenant.

Pertinent to the questions discussed here the following quotations from the opinion are offered:

“The general attitude of the plaintiff is that he, as the champion and representative of all the bondholders, in default of the trustee whose duty it was to act, has the right to reclaim the fund so improperly diverted, and compel the Railway Company to apply it to the purpose to which it was originally devoted. * * *

“Assuming that proposition, there would still remain other questions, of the gravest nature, which would also have to be resolved in his favor. Perhaps the most important one is embraced in the contention of his counsel that upon the certification and delivery of the bonds by the trust company, the trustee, to the railroad company,

they were at once impressed with a trust, lien or equity in favor of the trustee, for the benefit of the future purchasers, and that a breach of such trust by the use of the bonds for other purposes subjected all the parties engaged in it—whether the Railway Company or the defendants, or all of them—to liability to restore the proceeds obtained in violation of the trust, for the benefit of the holders of the bonds. The defendant's answer to the position is that the bonds had no inception or validity as obligations of the railway company until sold; that until then they were not property which could be the subject of a trust, and that at no time did the trustee of the mortgage have any property right or interest in them, legal or equitable; that the Railway Company held them, with the absolute power of disposition, and when they were delivered to Burke in exchange for the stock he acquired the absolute title, free from any trust, lien or equity in favor of any one. The defendant's answer to the plaintiff's claim on the theory of breach of the covenant, as a contract, would seem to be conclusive; and that is that he never made the covenant, but that contract, whatever its effect, was the act of the Railway Company, and that even if it were true that he caused it to be violated, by means of his control of the corporation, it does not follow that he is liable upon it, or that the plaintiff is entitled to sue for its breach in a court of equity."

The necessity in such cases as the one at bar of establishing a contract trust between the bondholder and the corporation, and the violation of that trust by the latter toward the purchasers of the bonds is further illustrative in *Banque v. Brown*, 34 Fed. 162, where it appeared that the complainants purchased a part of an issue of railway bonds in reliance upon representations of a prospectus as to the uses to which the bonds were to be put, and they were diverted from such purposes and used, it was claimed, in fraud of the rights of the bondholders. It was held that the trustees for the disbursement of the moneys occupied no fiduciary relations to the bondholders and could not be charged with an accounting at the suit of the latter. The opinion is too long to quote here.

The same general subject is discussed from another standpoint in *Dillon v. Barnard*, 21 Wall 430; 22 L. Ed. 673, where it is held that a provision in the mortgage for the application of bonds to the payment of a contractor created no trust in his favor in the funds realized from the sale of bonds under the mortgage, and could not be enforced by him.

None of these cases are exactly analogous to the case at bar, but the principles underlying them are the same. The whole case is one of contract between the bondholder and the company. In the case at bar the company agreed with the trustee for the bondholders that it would take down no bonds except for specified purposes. In so far as those purposes were

prospective the bondholder would clearly have a right to see that the company did not use the bonds or their proceeds for purposes other than those for which it obtained them, but where the purposes had already been accomplished and the company took the bonds to reimburse it for its expenditures made in accomplishing such purposes, then no question of diversion in the future use of the bonds could properly arise, and all the trusts upon which the company's rights to the bonds depended as against the bondholders were completely satisfied and performed. As stated in many of the cases which we have cited the company then became the owner of the bonds, and the question of its use thereof is one which concerns only the company and its stockholders. The fundamental difficulty with the interveners' position here is that they are in effect asking the company for something which, as between the company and them, belongs to the former.

The Idaho-Oregon Company is made a defendant and its corporate actions are being attacked because of an alleged fraud perpetrated by it against the bondholders. It is not a case where that company or its stockholders are seeking relief against the Railway Company for any fraud or unfair dealing perpetrated by the latter Company upon the former. No such question is involved. The only question here is whether these bondholders can attack the Power Company's right to issue these bonds for any consideration which it deemed sufficient, it being admitted that the bonds had properly passed from the

hands of the trustee into the treasury of the Power Company. We submit that this cannot be done.

3. *The Bill Essentially a Stockholder's or Creditor's Bill and Not Maintainable by Interveners.*

A brief summary of the contents of the Bill has been given in the Statement (*ante* pp. 10-14). From this analysis, as well as from the reading of the Bill itself, as contained in the Record, it will be observed that it is essentially a stockholder's or General Creditor's Bill, charging the Company and its directors with fraud, and, in so far as it presented a litigable matter in the cause (at least according to the decision of the lower Court), it charged the Company, through its corrupt Board of Directors, with having disposed of assets of the Company in fraud of the Company's rights, and, through it, of the rights of its stockholders and creditors, and asked for the removal of the Power Company, through a Receiver, from the dominating influence of the Railway Company, and the general administration of its assets for the benefit of creditors and others entitled thereto.

The whole theory of the bill is antagonistic to and not in aid of the foreclosure of the mortgage. It is specifically prayed that the decree of foreclosure be vacated. It is alleged and repeated that the foreclosure was unnecessary, that there was no actual default and that the foreclosure scheme was a fraud upon the Company. The specific allegation as to the 718 bonds here in question charges that the transac-

tion was, "As to the interveners and the Power Company, wrongful and fraudulent," and states that the bonds should be "called in and cancelled." The original bill contained no prayer corresponding with this allegation, and such prayer was substituted as an afterthought by amendments, (Record, pp. 47-50), we assume for the purpose of giving the interveners standing in the foreclosure proceedings if the Court should sustain them.

Following the theory of the bill, the decree (*ante* pp. 45-48) likewise proceeds, in effect, upon the theory that the Power Company was a going concern or was at least in the possession of a Receiver who was administering its property generally, and collecting its assets for the benefit of its general creditors and others interested therein; that these bonds in question were assets of the Company and therefore should be delivered to the Receiver; that the transaction was a fraud upon the Company, should be set aside, the parties restored to *statu quo*, and the Railway Company be put in the position that it was in, or should have been in, had it not been for the wrongful transaction.

Notwithstanding the allegations and theory of the bill, and the adjudications of the Decree conformable thereto, the Court sought to escape the obvious conclusion that such a Bill could not be maintained by these bondholders, by treating the Bill as an objection to the Railway Company's participation in the proceeds of foreclosure upon distribution proceedings, (*ante* pp. 42-43). To facilitate the disposal of

the case, the appellants agreed that decree might be entered at this time, as if entered upon the coming in of the proceeds of sale, and upon this objection then being made by these interveners to a distribution of the Railway Company (*ante* pp. 43, 44, 49).

We wish to emphasize that there is no criticism of, or objection to, the Court's assumption in this respect, in so far as it is regarded as furnishing the formal data which the Court regarded as necessary to a decision at this time, but the difficulty is that the Court in this decision has regarded as a formal or adjective question what is really a matter of substance. The theory of the Bill, and the real theory of the decree, is that the transactions, when had, were frauds upon the Company and its creditors. If they were such frauds, then the Company or its creditors may avoid them, and the Bill is properly framed to reach such a result, assuming it to be filed by the persons injured, or their proper representatives, but if they were not frauds upon such persons, or if the bill is not filed by the persons defrauded, then the whole theory of the Bill and the whole theory of the decree fails utterly, and the failure is not cured by the assumption, though joined in by all parties, that the substantial question involved is presented in a different manner, and at a different time than that in which it has been presented.

Let us assume, then, that the transactions were frauds upon the Company and, through it, upon its stockholders, and could therefore be set aside by them. We are met by the propositions:

(a) *The Interveners Are Neither Stockholders Nor General Creditors.*

This proposition, we think, requires no argument. The interveners are admittedly not stockholders. It is true that bondholders are creditors, but they are not general creditors but specific lien creditors, and by the terms of the contract giving them their lien it was subject to *pro-rating* with these bonds in whose ever hands they might be found. One *cestui que trust* can have no interest in who his co-beneficiaries shall be so long as they are within the terms of the trust. It must be admitted that these bonds or their proceeds could have been used in payment of claims of general creditors, retirement of second mortgage bonds, or even in the payment of dividends. In none of these ways would these interveners have received any benefit. The bill attacks the transactions, and the decree directs the return of the bonds, not because they were disposed of and the distributive share of the bondholders unlawfully cut down, but because they were disposed of improvidently, and in such form as to benefit indirectly the persons making such disposal, instead of for the benefit of the stockholders and the general creditors of the Company. Assume this to be true, then those stockholders and those general creditors are the persons to make complaint. If they are content, the bondholders have no right to make it for them.

(b) *As General Creditors the Interveners Have Not Brought Themselves Within the Rule, and the Record Affirmatively Shows They Were Not Prejudiced.*

The Rule referred to is that "subsequent creditors cannot avail themselves of a defense which the corporation has not made and which was available only to the corporation. If the corporation chooses to acquiesce, a creditor who became such afterwards will not be heard to impeach the transaction. This is well settled in respect to a fraud practiced upon a debtor. If the debtor waives the right to impeach the transaction or elects to abide by it a creditor subsequent to the fact will not be suffered to inquire into it or question it. *Graham v. Railroad Co.*, 102 U. S. 148; *Porter v. Steel Co.*, 120 U. S. 673. So, where a transaction is within the general scope of the powers of the Company, but is in violation of some limitation of law upon the exercise of the power, it cannot be challenged by those who subsequently become prejudiced."

Toledo, Etc. R. Co. v. Continental Trust Co., 95 Fed. 497, loc. cit. 528, 529.

This case is peculiarly in point, because the complaint there made was of the disposal by a Railroad Company to a director of bonds at less than par in violation of the Ohio statute under which the mortgage was made and the bonds issued. In addition to the foregoing quotation the following language of the opinion is also pertinent (page 525):

“But we also affirm the decree upon this point upon another ground; that is, that none of the appellants were entitled to challenge the validity of the mortgage bonds. The railroad company made no such issue. Its answer was a formal traverse of the formal averments of the bill, and made no question as to the validity of the bonds under Section 3313, Rev. St. Ohio, issued by it, and secured under the mortgage sought to be foreclosed. This defense has been made only under issues presented either by the answers or intervening petitions of general and unsecured subsequent creditors of the railroad company. May such creditors rely upon section 3313 as a defense against the enforcement of a mortgage and mortgage debt existing when they became creditors, and of which they had notice through registrations? Are bonds sold by an Ohio railroad company at less than par to a director so absolutely null and void that any subsequent creditor may interpose the defense and destroy the obligation, even in the hands of an innocent holder for value? Are they so absolutely void that neither the company nor its stockholders can waive the objection or validate them by subsequent ratification or long acquiescence? The construction contended for by counsel for appellants is that the bonds are void to all intents, and in the hands of every holder, and that the defense to them may be made by any creditor of the company.”

The Court concludes (p. 529) “The corporation

having made no issue and having chosen to acquiesce in the purchase of bonds averred to have been sold to the directors, the defense is not available to subsequent creditors."

In this case there is no allegation or proof as to when the interveners acquired their bonds, and they do not, therefore, establish the first essential condition upon which creditors may impeach the transaction.

Moreover, and, we think, more important, the record affirmatively shows that general creditors could not have been injured by the transaction, because the bonds exchanged and surrendered by the Railway Company for the bonds here claimed were likewise prior to the claims of general creditors. This point, however, we develop more fully under a later head of the argument, and we will not dwell upon it here.

II.

**The Transactions Were Not Fraudulent Nor Subject to Avoidance
by Stockholders or General Creditors, Nor Was
Any Person Injured Thereby.**

The transactions of September 25th involving the loan of \$250,000 and of December 27th with respect to the Bates & Rogers settlement, each stand on somewhat different grounds in fact, and the facts pertaining to each should be separately discussed, although essentially the legal effect of both may be very largely considered together.

(1) *The Transaction of September 25th.*

The facts in connection with this transaction are

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(1) *The Transaction of September 25th.*

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set forth at length in the statement (*ante* pp. 29-40). In essence they are very simple and may be briefly summarized. The Bankers, Kissell-Kinnicutt & Company, were under contract to buy \$1,500,000 of the company's second mortgage bonds to yield \$1,200,000. Under this contract they had already purchased \$1,325,000 of these bonds, and were obligated to purchase but \$175,000 more, which would have yielded the company \$140,000. The company was in immediate need of \$203,000 (Record pp. 426-429, Exhibit F). To this estimate of demands of the company's manager the managing director Mr. Watson added for the next three months approximately \$50,000, making a total of \$250,000 (*ante* p. 34). The Company was not even approximating in earnings the interest upon its second mortgage bonds, and default upon those bonds, if the earnings or any cash available should be relied upon to pay that interest, would fall inevitably on November 1st, less than forty days from the date of the meeting of September 25th. In addition to these facts the company was confronted by competition in the heart of its market (*ante* pp. 32-33). The competitor had already obtained its franchise, built its line to Boise City, and had completed its soliciting campaign, having signed up contracts, the number of which there was at that time no means of determining. It had also established a new rate some forty per cent lower than the existing rate of the Power Company.

Under these conditions the Power Company ap-

plied to the Railway Company or, if you please, to its own directors, to consider the matter in the most unfavorable aspect from the standpoint of the Railway Company, for a loan of the estimated requirements to keep it going for the next six months until some policy for the future might be determined. The Railway Company, or the directors, exacted as conditions of this loan: 1. A release of the obligation of the Bankers to satisfy the balance of their commitment; 2. First and Refunding bonds which were in the treasury available for the purpose or subject to certification, in the ratio of two to one for the loan of the needed \$250,000; 3. The exchange of \$500,000 six per cent consolidated or second mortgage bonds held by the Railway Company for a like amount of the refunding five per cent first mortgage bonds, so far as such bonds might be available for the purpose. There was no likelihood that the full amount would be available, and in fact less than half the amount has ever been available.

Upon this phase of the case the court said (Record pp. 139-140):

“That under the circumstances such an agreement was thought by anyone to be in the interest of the Power Company is wholly incredible. I cannot believe that an independent board of directors would have given to it a moment’s consideration. The Company needed money it is true, but if it was going on with the Ox Bow development the sum contracted for was wholly inadequate for any useful purpose, and if the

work at that point were not to be resumed, there was no urgent need for so large an amount. Those who participated in the transaction are unable to give any reasonable explanation of the purposes for which the \$250,000.00 were to be used, and apparently there is none. The company had available on demand \$140,000.00, due upon the Kissel-Kinnicutt contract, and surely both upon the market and in fact its first mortgage bonds were worth in excess of fifty cents on the dollar, the basis upon which they were to be hypothecated to procure the loan. Under the conditions created by the agreement the possibility that there ever would be a redemption was so remote as to be negligible. The transaction therefore practically amounted to a sale of between \$200,000.00 and \$500,000.00 face value of the first mortgage bonds for an equivalent amount of seconds, which it is apparent must have been wholly valueless if the firsts were worth less than their face, and the surrender, without any real consideration, of the obligation of the syndicate to take \$175,000.00 face value of the seconds at 80. There is but one rational explanation of the agreement, and that is that the interests in control of the Railway Company, and, through it, of the Power Company, having concluded that the latter was hopelessly insolvent, and that a reorganization was inevitable and a receivership probable, resorted to this expedient for saving to themselves as much of the wreckage as possible."

We do not think these conclusions are justified by the admitted facts in the case or by any inference which can properly be drawn therefrom. The money required was absolutely essential to keep the company afloat at all. The financial condition, as shown by the evidence of the interveners, was such that it could not meet its obligations and survive the 1st of November. The statement submitted by Mr. Markhus, the company's manager (Record pp. 426-429), which (p. 425) was prepared by him about September 1, 1912, and thereupon forwarded to the managing director Mr. Watson, showed in detail the need for \$203,000 for the period ending December 31, 1912. This statement is likewise referred to by Mr. Mainland, one of intervener's principal witnesses (*ante* p. 39), as having been so sent to Mr. Watson, and is nowhere disputed. It is true that neither Mr. Fuller, Mr. Watson, Mr. Wiggin nor Mr. Hendee could recall the details of these financial requirements at the time their depositions were taken. But how could those details be better or more conclusively proven than by the identification of the estimate thereof made by the company's manager at the time? To this estimate it is true that \$50,000 was added, possibly arbitrarily, but, if so, it was not unreasonable to assume that a company requiring over \$200,000 for four months would require under conditions becoming increasingly adverse within the next three months the added amount. With this admitted testimony in the record then why does the court state and base his decree in part at least, upon the proposition that the money was not needed?

This statement is followed by the one that the company had available on demand \$140,000 due upon the Kissell-Kinnicutt contract. The statement is true in fact, whether true in law has never been presented for adjudication. If it is true, as the court likewise assumes in its decision, that the second mortgage bonds were valueless, there might be a serious question as to whether the Bankers were obligated to complete the purchase of securities demonstrated to be worthless. In any event, it is entirely possible, assuming the directors to have been entirely honorable men, that they would not have called for the balance of this commitment under these conditions when it could do the company no real good. Or, looked at in a more unfavorable light, the Bankers, dictated by their own interests, might have refused to perform their contract, hoping to escape the obligation imposed on one ground or another, rather than to deliberately give up \$140,000 which would in any event be the utmost measure of their liability. A compromise of such litigation or of this situation as an entirety by substituting the first mortgage five per cent bonds for the second mortgage bonds to the extent of the commitment involved would not have been unreasonable or corrupt. We feel satisfied that no court would hold that an insolvent corporation is bound, because it has an outstanding contract to sell its securities, to increase its indebtedness by completing such sale. We think therefore, that the second statement of the court that the Company had this sum available on demand is true only conditionally and with qualification.

The court next states that upon the market, and in fact, the first mortgage bonds were worth in excess of fifty cents on the dollar. We think there is not a word of evidence in the record to justify this finding. It is true that pages of the record (roughly, pp. 323 to 373) are devoted to establishing this proposition. That the bonds could have been sold by Kissell-Kinnicutt & Company or any bond house through whom they would place them, we admit; but would this court, or the trial court, have sanctioned a sale under the circumstances then existing? We call particular attention to the cross-examination of the witness Mr. Ranstead on pages 327 to 331 of the Record, and the testimony of Mr. Reynolds on pages 341 and 342 thereof. Without quoting this testimony in detail it is apparent that all the bond sales had during the year 1912 were generally based upon the proposition that a strong financial syndicate had gotten behind the properties of the Power Company, and would take care of any situation which might arise, and buyers generally were not aware of the Company's actual condition (Record pp. 343, 345). It would have been a palpable and inexcusable fraud, legal and moral, upon the public, approaching if not equaling criminality, to have brought these bonds out on the credit of the syndicate without stating the actual conditions. If the conditions were truly stated, viz., That the Company could not earn the interest upon those bonds outstanding at its present rates, and that those rates on January 1st would have to be cut to meet compe-

tition at least forty per cent, in addition to the loss of all business which the competitor might get, we do not think the bonds were worth fifty cents on the dollar, or any other sum of money. They simply could not have been marketed.

Doubtless what the court means is that upon the distribution the bonds would have realized fifty cents. Whether that is true or not remains to be seen. There is nothing in the Record to show what they are worth further than the stipulation on page 381 that "The properties of the Power Company should be deemed of less value than the aggregate of the first mortgage bonds; that is, that they would not bring the amount of such bonds on foreclosure sale." There is nothing to show that they were worth twenty-five cents on the dollar, and we think we may state as a proposition judicially known, that dissenting bonds not included in a reorganization, on foreclosure of a corporate mortgage may not realize more than from ten to twenty-five cents on the dollar. If in fact the Railway Company had procured the entire 718 bonds as security for its loan of \$250,000 and interest, there is nothing to show, and we do not believe that it will have more than enough—if enough—security for such loan.

Turning to an affirmative argument, we submit that the Record here shows that the Power Company, particularly its stockholders, received a very valuable consideration through this transaction, namely, the maintenance of the company as a going concern until such time as its future could be considered and

determined in the light of the new conditions which were to surround it. It could not pay the interest on its second mortgage bonds under the existing conditions. That had been demonstrated and consequently a reorganization was inevitable. But how extensive the reorganization must be, could only be determined after gauging the actual effects of competition, and with a view perhaps to the possibility of determining whether a reorganization could be effected with the co-operation of the competitor, embracing both companies in a consolidation. Competition in public utilities usually results in consolidation within a very short time. The economic, judicial and legislative history of this country conclusively demonstrates this fact. The public service commission laws of the last ten years recognize it in providing for regulated monopoly as distinguished from unregulated competition. That the Power Company, then, under these conditions, should be maintained for another six months was of great value to it.

We therefore submit that the transaction of September 25th was a fair and equitable one and beneficial to the Power Company, and that the identity of the two boards of directors resulted in no prejudice, or violation of trust owed to the Company.

(2) *The Transaction of December 27th.*

The facts in connection with this transaction have likewise been fully hereinbefore stated (*ante* pp. 40-43). It clearly appears therefrom that there had

been a dispute of several months standing with Bates & Rogers on which settlement was pending. The statement of the Company's engineer furnished the reason for the settlement, as shown on page 280 of the Record as follows:

“Mr. Rogers of Bates & Rogers Construction Company has been here for the last two or three days discussing the Ox Bow contract. He was very anxious to do the work on the basis of *the unit prices in the contract*, which were evidently not intended for the kind of work which you are now proposing to do. If done on this basis I should say that the work would cost \$100,000 more than it would if the Company did it directly.”

It was therefore to the advantage of the Company to get rid of this contract. The intervener's principal witness, Mr. William Mainland, gave at some length a history of these negotiations (Record pp. 312-315). It appears therefrom that the Bates & Rogers Company agreed to accept in settlement of their claim, besides certain cash, fifty shares of the preferred stock and one hundred shares of common stock of the Railway Company, and \$25,000 of consolidated bonds of the Power Company if they should be guaranteed by the Railway Company at 80 on eighteen months time (Record p. 419). Mr. Mainland thought that Mr. Rogers would have accepted something else, but, however that might be, this is the consideration that he agreed to accept. The

Power Company therefore applied to the Railway Company or, to its own directors, if you please, to agree to this settlement, and to issue the securities and the guaranty demanded by the Bates & Rogers Company. The Railway Company acquiesced but upon its own terms. We may admit that those terms were harsh, but we submit that no one at that time who knew the conditions would have loaned the Power Company anything except upon harsh terms, and that under the conditions prevailing harsh terms are not to be construed as fraudulent terms.

Possibly what the Railway Company actually got under the contract or was entitled to receive in addition to what it was already entitled to receive under the contract of September 25th, should be considered, rather than what it was nominally entitled to receive by the face of the contract. As a matter of fact the Railway Company was entitled under the contract of September 25th to receive \$282,000 face value of bonds more than it has ever received under both contracts. It has actually gotten nothing under the Bates & Rogers contract which it was not theretofore entitled to. The number of bonds thereafter transferred, and for that reason assumed by the court to have been transferred under the latter contract, was \$278,000.

The court in its decision, says (Record p. 144) :

“From the testimony and the surrounding circumstances, no doubt is left in my mind that the Power Company could have made settlement

directly with Bates & Rogers with its first mortgage bonds at a comparatively small discount, and that the devious course was adopted not upon their demand or for the interest of the Power Company, or because of any necessity therefor, but for the sole purpose of furnishing a pretext for getting the first mortgage bonds out of the treasury of the Power Company and into the hands of the Railway Company, and for the interest alone of those by whom the latter company was dominated."

The court further said (Record p. 143) that the Railway common stock was worthless, its preferred stock worthless, and its obligation to buy the bonds unenforcible "because of its insolvency if for no other reason."

It may be admitted that the stock of the Railway Company, by reason of the appointment of a receiver therefor, as stated in the record, and its confession of its insolvency in December, 1913, may and will prove to be worthless. It may be admitted likewise that its obligation to buy, or guaranty of, the Power Company's bonds is equally worthless, although the record here does not support that statement. Does it follow or is it inferable, that these securities were worthless in December, 1912? Assuming, however, that they were worthless, Bates & Rogers wanted them and were willing to take them and the Power Company was released from an onerous contract which would have entailed an excessive

cost of \$100,000 as estimated by its engineer in the construction of its plant, and should not some consideration be given to the benefit which the Power Company and its stockholders obtained in the cancellation of this obligation?

True, if the Power Company was hopelessly insolvent as then seemed to be the case, its rights may not be of great importance if their protection is secured at the expense of creditors, but that the creditors were not injured we will endeavor soon to show, and in fact creditors and the estate generally, including any interest which the stockholders may have, would be enhanced by disposing of a claim of the magnitude of that of Bates & Rogers. So likewise a stockholder's or other heavy liability of individuals interested in the corporation, might be avoided by the settlement of the claim.

Surmise and conjecture such as Mr. Mainland indulges in, as to what Bates & Rogers would have accepted in settlement of this claim, we think entirely beside the point. It is evident that they all felt, as stated in the testimony of Mr. Mainland (Record p. 313) that the Railway Company "*was the Bankers' Company*" and its guaranty would be good. The most that Mr. Rogers ever said about taking first mortgage bonds was "He would consider seriously accepting the first and refunding bonds at the regular and sale price, but absolutely refused to take the consolidated bonds without a guaranty." (Record p. 314). We think therefore, under the

conditions prevailing, that the Bates & Rogers transaction cannot be condemned as a fraud.

Assuming, however, that these transactions were for the advantage of the Railway Company and of no more than negligible advantage to the Power Company and that they were, if not actually fraudulent, at least constructively so by reason of the position of the persons obtaining the advantage thereby, does that fact give any legal cause of complaint to any person interested in the Power Company, and was any such person legally damaged? The only possible classes of persons interested in the Company, and who could have been damaged by such transactions or entitled to avoid ~~it~~, were the first mortgage bondholders, second mortgage bondholders, general creditors, stockholders, or a receiver. We will consider these in their order.

(a) *First Mortgage Bondholders.*

Let us consider the transactions in their baldest aspect and, as the Bates & Rogers transaction was considered by the Court, as simply a device on the part of the Railway Company to procure first mortgage five per cent bonds in exchange for second mortgage six per cent bonds then held by the Railway Company. We submit on this assumption that no person interested in the Company could conceivably have been damaged by the transaction in any way, except the first mortgage bondholders, whose distributive share on the foreclosure of their mortgage

is thereby cut down. This was *damnum absque injuria*.

It has already been shown at length that these bonds were legally certified by the Trustee, and delivered to the Company; that the first mortgage had been fed by the expenditures upon which these bonds were certified, and the security thereof increased in cost and presumably in value in the ratio prescribed by the mortgage as condition of certifying the bonds, the aggregate being considerably in excess of the face of the bonds so certified. Liability then of the interveners' first mortgage bonds to be cut down by bonds subsequently issued was one of the express terms of their contract. How are they injured by the fact that in the distribution of these bonds one creditor has been preferred to another?

This wrong to the first mortgage bondholders, if wrong it was, was essentially a breach of trust relationship which is erroneously, we feel, inferred by the Court to exist between the directors and those bondholders. But certainly aside from the proposition which we have heretofore advanced (*ante* pp. 82-84) that there is no such trust relationship on the part of the directors to bondholders, we contend that a trust cannot be inferred in express violation of, or repugnance to, the terms of the instrument creating it.

In so far as any such trust relationship involves individual liability it is expressly waived by that clause of the mortgage, by which it is expressly agreed (Record p. 396) "That the past, present and

all future incorporators, officers, directors and stockholders of the Company, shall not be individually liable to any extent, or for any purpose with respect to such bonds or the coupons thereon, or any of them, or for any thing or act done or omitted, and any such liability by statute or otherwise, is expressly waived." Certainly if the transactions here involved were frauds upon the first mortgage bondholders they would afford a right of action for damages against the persons doing them. If such right is waived, and the bondholder agrees to look solely to the security which he gets for his money then no right of action could accrue to him under the circumstances.

But regardless of this clause, other provisions make all bonds certified under and secured by the Mortgage "equally and proportionately secured" thereby, as if executed and negotiated simultaneously with the execution of the mortgage, "it being intended that the lien and security of this indenture shall take effect from the day of the date hereof, without regard to the date of actual issue, sale or disposition of said bonds, and as though, upon the day of such date, all of such bonds had been actually issued, sold and delivered to, and were in the hands of, innocent purchasers for value" (Record p. 386). Thus it is intended by the mortgage that every bondholder shall be entitled to but that fractional part of the security, which his bond bears to the total number of bonds which may have been certified, and be entitled to issuance under the mortgage, and it

was to obviate just such conflicts, we take it, as have arisen here, that this provision was made.

Therefore, we submit that the liability of these bondholders, the interveners here, to have their security impaired by the issuance of other bonds of equal security against the same property was one of the conditions of their mortgage with which their bonds were burdened, and the diminution of their security in this manner is in no sense a legal wrong.

Before passing this question, which we have already discussed at too great length, considering the exhaustive argument heretofore made in support of practically the same proposition, permit us to urge that if this act was a legal wrong to these bondholders because it diminished their security, notwithstanding the provisions of the mortgage subjecting that security to such diminution, let us say so and place our decision upon that ground. We feel that the trial Court has become impressed with the view that this transaction was of such a nature that the Power Company should have resisted it, and would have done so, except for its domination by the Railway Company and that that Company should not be permitted to profit by its dominating position over the Power Company, and upon discovery of the fact that the bonds were obtained in an improper manner the Court on its own motion should refuse to countenance the transactions and enforce them. We feel that this attitude, in which naturally we cannot share, is the only way in which the conclusion can be arrived at, that these interveners can contest these

bonds. The fundamental difficulty with the attitude, outside of the legal objection to its failure to distinguish between the respective rights and remedies of the various parties is that it obscures the essential integrity of the transaction, otherwise demonstrated by the fact that no objection is made to it by any person entitled to object, because no such person was injured thereby.

(b) *Second Mortgage Bondholders.*

It is stipulated in the record that the properties will not sell for sufficient to pay the first mortgage indebtedness (page 381). This being true we cannot see how holders of second mortgage bonds were prejudiced by these transactions. We have already shown that as to them the first mortgage bonds were legally issued, the first mortgage being expressly left open for additional issues which should be superior to the second mortgage.

The second mortgage in this respect provided (Record pp. 200-201) :

“Section 1. Seven Million Dollars (\$7,000,000.00), par value, of said \$1,000 bonds shall be reserved to be issued and delivered for the purposes of refunding, redeeming, purchasing, taking up, retiring or paying at, before or after maturity any and all bonds now issued or hereafter to be issued by the Company under and pursuant to the terms of a certain Indenture dated April 1st, 1907, between the Company and the State Bank of Chicago, as Trustee, which last men-

tioned bonds are hereinafter called "Underlying bonds," and the indenture securing them the "Underlying mortgage," under which Indenture the issue of \$7,000,000 of bonds was authorized, but only two million seven hundred and ninety-nine thousand dollars (\$2,799,000.00) of bonds have heretofore been issued and are now outstanding."

It is interesting to observe in this connection that all the bonds certified under the first mortgage whether previously actually sold or not are recited as outstanding. The total amount of bonds theretofore sold to the public was \$2,494,000 (Record pp. 378, 379). The mortgage recites the number outstanding as \$2,799,000.00.

The Court in commenting on this phase of the case said (Record p. 140) :

"Putting aside for the moment all question of rights of these interveners, it is plain that there was a breach of trust on the part of the officers of the Power Company and a disregard of the rights of the holders of approximately \$166,000, face value of consolidated bonds which had been put upon the market and were held by the general public who would therefore be prejudiced by the issue of first mortgage bonds in exchange for the Consolidated, or seconds."

This would be true should the property sell for a sum in excess of the face of the first mortgage bonds, but in view of the stipulation that it will not

sell for that amount, we cannot see that the second mortgage bondholders were in any way injured. If there be a trust relationship between the second mortgage bondholders by reason of their interest in the common security, and the property should sell for enough to realize some funds for these bondholders, it might be that independent second mortgage bondholders would be entitled to claim an interest in the proceeds of the first mortgage bonds after reimbursing the Railway Company, for their share of the amounts advanced by the Railway Company in securing such first mortgage bonds. However, this question is not before the Court in any way. The Railway Company was the owner of approximately nine-tenths of the second mortgage bonds. It evidently sustained such relations to the holders of the other bonds that they have not seen fit to question the transaction in any way. Should they be entitled to participate with the Railway Company in the proceeds of these bonds such participation may be decreed to them at the proper time.

(c) *General Creditors.*

General creditors are not injured by the exchange, because the second mortgage indebtedness was ahead of them equally with the first mortgage indebtedness. There is no trust relationship between a company and its creditors, in which the latter can insist upon the application of the proceeds of the bonds to their claims, even where the mortgage expressly provides that the bonds shall be used for that

purpose. The trust in such case is to the bondholders and not to the general creditors.

Dillon v. Barnard, supra.

We have been unable to find any case in which it has been contended that general creditors, without an express provision in the mortgage, have any right to the proceeds of the bonds as such. The Company could have kept these bonds in the treasury, and upon distribution, the general creditors would not have come in until after the second mortgage had been satisfied, and in such case such creditors would be equally postponed to the second mortgage bonds as to the first.

Claflin v. S. Car. R. Co., supra.

Mining Co. v. Coosa Furnace Co., supra.

This position seems self-evident. The Court below evidently awarded the interveners relief upon the theory that creditors are awarded relief against preferences of Directors to themselves; an application of the trust fund doctrine (Record pages 145-149). If these bonds constituted assets in the treasury available to satisfy the claims of the general creditors, then unquestionably such creditors are injured by the transaction, unless the rank of their judgment as against the general assets of the Company would be subordinate to that of the second mortgage bondholders. We have not found any case wherein this question has been determined. So far as the argument here is concerned the proposition may be conceded, because, if conceded, these bonds

would share equally with all other bonds in the distribution of the assets of the Power Company, and the question would arise upon distribution as to whether the Railway Company or its general creditors, if there be such other than the Railway Company, are entitled thereto. If on the other hand as first contended under this sub-division there is no equity in favor of general creditors in these bonds they are clearly not damaged by the transaction in question. The interveners here would resist vigorously any attempt by general creditors to reach these bonds or to share in them. It is not in the interests of the general creditors that this litigation is waged but in that of the first mortgage bondholders alone.

(d) *Stockholders.*

The company's stockholders are not injured, because the company owed the same amount of money before the exchange as afterwards, with the exception of such new money as the company obtained. the only difference being that the obligation was formerly evidenced by second mortgage bonds and afterwards by first mortgage bonds. In either event there was the same aggregate indebtedness out ahead of the stock, and upon distribution the stockholders would not receive a dollar more if this exchange had not been made, than if it had been made.

The Company was under no more obligation to prevent the foreclosure of the first mortgage than of the second, and the rights of the stockholders would have been equally foreclosed, and

their interest in the company wiped out, by foreclosure of the second mortgage as of the first.

(e)

A Receiver.

A receiver of the Company can have no greater rights than those of the persons whom he represents. *High Receivers, Section 204, 205.* The question of the rights of action of a receiver to redress on behalf of the corporation or its creditors for frauds committed by the officers and directors of the Company, is exhaustively discussed in *Great Western Mining Co., v. Harris, (C. C. A. 2d Circuit), 128 Fed. 321.* It is there shown that any right of action to attack fraudulent transactions including over-issues of stock to Directors, accrues not to the corporation itself, which is a party to the transaction, nor to creditors generally, some of whom were such before the transactions ~~were~~ complained of, but only to the particular creditors defrauded, and therefore that such suit could not be maintained by the Receiver suing on behalf of creditors generally, or of the corporation.

However, we have doubtless followed this branch of the argument too far already. This bill is not brought, nor on the assumption of the Court is any objection made to these transactions, by Second Mortgage Bondholders, general creditors, stockholders or the Company's receiver. The receiver is merely the Court's officer to carry out his decrees and administer the property in accordance with his orders. He

has no interest in the question of the priorities between the creditors in the distribution of the common fund. In no view on the state of the record here shown has any person been placed in a worse position by reason of these transactions, except the First Mortgage Bondholders and their position is made worse not by any acts of the Directors fraudulent as to them, but solely by the letter and spirit of their contract, which they are seeking to transcend.

III.

The Transactions Merely Awarded Appellants Equitable Reimbursement for Their Expenditures.

Looked at from the standpoint of the creditor, the Railway Company, assuming the insolvency of the Power Company and the imminence of its liquidation and disregarding every consideration for the transaction involved save and except the surrender of the second mortgage bonds, we can conceive of no fairer act by a board of independent directors than the transaction here questioned consummated. The Railway Company, or, more correctly, its assignors, the Bankers, had contributed \$1,060,000 in cash into the treasury of the Power Company. There is no complaint or question made here that every dollar of this amount was not expended honestly and properly in additions to the plant of the Power Company and thus augmenting the security of the first mortgage bondholders, and in the proper maintenance of the company as a going concern. It is expressly

conceded that from the proceeds of these bonds and the earnings of the company there had been expended on the plant account of the Power Company approximately ten-ninths of the face value of these bonds, and that such expenditures had been made for purposes for which such bonds might lawfully have been issued in the first place. This is, of course, exclusive of all expenditures made from the proceeds of these second mortgage bonds on account of the Ox Bow development for which the first mortgage bonds could not have been issued. Under these circumstances we ask, why should the interveners be entitled to alone share in the proceeds of the first mortgage and to exclude therefrom others who had equally contributed to the common security.

In this situation, where do the abstract equities lie? Shall the interveners be permitted to say to the stockholders, "we appreciate that moneys which might have been utilized in paying dividends to you have served to add to our security, yet you have no interest in the bonds which we agreed should be issued against such expenditures;" and to the second mortgage bondholders: "We quite agree that your bonds are worthless and that the moneys obtained from the sale thereof have increased our security to the extent of \$1,200,000, or thereabouts but, notwithstanding that fact, your contract does not provide that you shall be entitled to any interest in the first mortgage bonds which we agreed should be issued against the use of the moneys which you so

provided, and, accordingly, we propose to retain all of such security, and, although, in accordance with our agreement, bonds have been issued under our mortgage against the expenditures of your money, you cannot participate in the security." Such, in substance, is the position of these interveners.

If we are correct in the conclusion that, when the bonds were certified and delivered to the mortgagor, they became its absolute property, obviously abstract equity required that they should be utilized to restore to the stockholders the earnings which had been used in adding to the first mortgage security and to repay the loans made by the second mortgage bondholders which had provided the balance of the funds utilized to further increase the security of the first mortgage bonds.

Indeed, although we are frank to say we have not found any adjudicated case supporting the proposition, on principle, we go further and submit most earnestly that, should the transaction in question be avoided and the bonds in controversy be restored to the treasury of the Railway Company, a court of equity should, upon distribution of the proceeds of a sale of the property covered by the lien of the first mortgage, permit the said bonds to share in such distribution, ascertain the sums contributed to the security of the first mortgage, respectively, from the earnings and from the proceeds of the second mortgage bonds, if such ascertainment be possible, and apportion the distributive share of such bonds

in the proportions determined; or, if such proportions cannot be determined, that such distributive share should be devoted to such purposes as to the court shall seem most equitable. We assert this proposition, because, to our mind, it is highly inequitable that, merely because the second mortgage indenture fails to provide that all first mortgage bonds, issued against property purchased with or improvements and betterments made from the proceeds of the sale of the second mortgage bonds, shall be deposited as additional security under the second mortgage, the holders of the other first mortgage bonds can retain the benefits derived from the money of the second mortgagees, without the latter being subrogated to the rights of the mortgagor in the bonds obtained by it through such expenditures. Indeed, we see no reason whatsoever why the principle of subrogation should not apply.

It seems to us that it is not necessary to defend these transactions to go to the length that we have in this discussion. There seems to be an assumption throughout the interveners position here, that as against the company and in the eyes of the law the first mortgage money is entitled to be regarded as much more sacred than the second mortgage money. We think this assumption entirely unfounded. One dollar of this money is just as good and entitled to just as much protection as another dollar, except as the parties have been able to secure for themselves better legal security. The company owed the money

on its second mortgage bonds, just as much as on its first, and was equally bound to repay it and protect its security in every way. If the company could get the second mortgage bondholders participation in the first mortgage under the terms of the latter instrument, we can see no reason why the second mortgage bondholders should not demand that it should do so, and obtain a satisfaction of their demand if able. So if the Company could reduce its second mortgage indebtedness, by issuing additional bonds under the first mortgage there is no reason why it should not do so. The first mortgage bondholders are entitled simply to the security for which they contracted, and so far as that security gives them a better position than the second mortgage bondholders they are entitled to it. But if the latter are able to secure participation in the first mortgage under the circumstances, they are likewise entitled to do that, and the court should seek to protect them in their investment equally with the first mortgage bondholders.

We therefore submit on the various grounds stated, that the assignments of error affirming the validity of these transactions should be sustained, that the decree should be reversed in toto, and that decree should be ordered in favor of appellants confirming their full ownership and the validity of these questioned bonds.

IV.

Assuming the Invalidity of the Transactions the Bonds Were Enforceable to the Extent of the Consideration Given Therefor.

If the delivery of these bonds to the Railway Company be regarded as fraudulent as against the Power Company and through it, the interveners, and such fraud can be urged by the interveners to defeat the claim of the Railway Company to the ownership of these bonds in their entirety, the Railway Company would nevertheless be entitled to hold the bonds, and to receive dividends thereon, up to the amount of the value parted with by the Railway Company.

(a) *The Principle of Rescission.*

The Bill in Intervention, as has previously been shown, is in essence a stockholders or creditors bill to set aside the transaction, both for fraud and want of authority in the responsible officers of the corporation to enter into the same. In such cases the authorities are uniform that the transaction can be set aside only upon condition of return of all considerations received, and the restoration of *status quo*. This Court has further expressly held that unconditional offer to do equity in this respect must be made in the bill itself, and that even an offer to credit the amount on any judgment recovered against the defendant is insufficient.

Alaska & Chicago Commercial Co., v. Solner, 123 Fed., 855.

See also, for applications of the general principle,
New Castle R. Co., v. Simpson, 23 Fed. 214.
Fleckenstein v. Waters, 160 Mo., 649.
Barr v. New York R. Co., 125 N. Y. 263.
Jones v. Green, 129 Mich. 203.
Hitchcock v. Barrett, 20 Fed. 653.
Symmes v. Union Trust Co., 60 Fed. 830.

Other cases hereinbefore cited likewise establish this proposition, and the decree entered by the District Court here recognizes the principle, although, as we shall endeavor hereafter to show, does not fully enforce it.

(b) *Enforcement of Fraudulent Bonds.*

If we assume, as the trial Court assumes, that the proceeding in essence is a part of the foreclosure, and that the Railway Company is an actor seeking to procure its distributive share upon its bonds, the principle is not fundamentally different, although it may be expressed in a different way, and, as we have said above, the Railway Company, although it cannot enforce the bonds in their entirety because of the fraud, is nevertheless entitled to enforce them up to the amount of the value given by it therefor.

This question is authoritatively settled in *Thomas v. Brownville, etc., R. Co.*, 109 U. S. 522; 27 L. Ed. 1018. There suit was brought to foreclose a mortgage under which bonds were issued on a construction contract, in which the directors of the corporation issuing the same were interested, and from which they received benefits clearly detri-

mental to the interests of the Railway Company. *Stockholders* intervened setting up the defense that the bonds were fraudulent, and asking that they be cancelled. On a reference to a master it was found that the construction company had actually expended about \$200,000, in building the road under the fraudulent contract. The lower court, however, refused to allow recovery even of the amount actually expended. On appeal to the Supreme Court the latter said that the contract was not absolutely void, but voidable at the election of the parties affected by the fraud; that it could be ratified or avoided by them; that the bonds and mortgage to the extent of the consideration which the company received were good and enforceable.

The court further said:

“There is another principle of equity jurisprudence which leads to the same conclusion.

“The stockholders who have resisted complainant’s claim were not parties to the original suit for foreclosure, nor were they either necessary or proper parties as the case then stood. The decree and sale were made in a suit where all the usual parties to such a suit were agreed.

“These stockholders had no legal right to interfere. It was only by permission of the court that they were allowed to come in and contest the validity of the mortgage. In doing this, they became actors. They filed their cross-bill.

“In this condition of the case they are amen-

able to the rule that they who seek equity must do equity. It is just that they should pay a fair price for what they have received; that this mortgage, given for the construction of the road, though excessive by reason of the fraud in the contract, should stand for the reasonable value of what the company actually received in the way of construction. To permit these interveners to defeat the mortgage on any other terms would be unjust and would make the court the instrument of this injustice.

“The decree of the Circuit Court, therefore, be reversed and the case remanded to that court, with directions for a decree in favor of the plaintiff for the sum of \$205,947.66, with interest. If a sale becomes necessary, this sum must be paid out pro rata on the bonds secured by the mortgage, on their being produced and canceled, or surrendered for cancellation, provided the road sells for so much.”

See also,

Wardell v. U. P. R. Co., 4 Dill 339; affirmed
103 U. S. 651, 26 L. Ed. 509.

Foster v. Mansfield R. Co., 36 Fed. 627.

Thomas v. Peoria R. Co., 36 Fed. 816.

It is unnecessary to pursue this question further, at least upon the principal appeal which is the subject of this brief, as the Court recognized it both in its decision (Record pp. 151, 162) and in its decree (*ante* p. 47). The complaint against the Court's de-

cision is that it limited the bonds against which the Railway Company was entitled to enforce its claim for advances made to those originally pledged technically as collateral security, viz: \$440,000 (*ante* pp. 44, 45) and furthermore failed to allow the Railway Company credit for the full consideration parted with by it in the transactions.

No question is made or can be urged that bonds may not validly be issued in pledge for indebtedness, even at a discount. *William Frith v. So. Carolina L. & T. Co.*, 122 Fed. (4 Cir. C. C. A.) 569. *Atlantic Trust Co. v. Woodbridge Canal Co.*, 79 Fed. 501; 86 Fed. 975.

Upon foreclosure of the pledge the purchaser, even though the pledgee himself buys them in, may enforce them to their full face value regardless of the amount for which he took them in pledge.

Wade v. Railway Co., 149 U. S. 327; 37 L. Ed. 775.

Farmers L. & T. Co., v. Toledo R. Co. 54 Fed. 759.

If the pledgee still holds them in pledge without having foreclosed, he is nevertheless the owner thereof, and is entitled to prove ownership up to the face value of the bonds, although on distribution he may only receive dividends up to the amount of his pledge.

Jerome v. McCarter, 94 U. S. 734; 24 L. Ed. 136.

Duncome v. N. Y. R. Co., 84 N. Y. 190.

Hinckley v. Pfister 83 Wis. 64.

Where a corporation has pledged its bonds as collateral for a debt, it may afterwards assign its equity in such bonds to the pledgee, and the latter will thereby become absolute owner of the bonds.

Bibber-White Co., v. White River Valley E. Co. 175 Fed. 470.

Therefore the Court's decision recognizing the pledge of the 440 bonds was doubtless correct as far as it went. But as shown in the decision in *Thomas v. Brownsville Etc. R. Co.*, *supra*, the question here is not one of technical pledge but of the consideration given for the fraudulently issued securities. In the case at bar the Railway Company agreed to part with \$250,000 upon notes of the Power Company, in consideration of receiving \$500,000 face value of the Power Company's First and Refunding mortgage bonds as security, and the privilege of exchanging consolidated bonds for up to \$500,000 additional of said refunding bonds. The most bonds that it ever received was \$718,000 face value, either under this transaction or the transaction of December 27th, with respect to the Bates & Rogers settlement. Therefore it holds less than it was entitled to under the original agreement of September 25th. Now if that agreement of September 25th was invalid for fraud, and therefore subject to be set aside, it was so fraudulent only to the excess of consideration received or agreed to be received over value given.

In such case, then, the Railway Company under the principle laid down in *Thomas v. Brownville etc. R. Co., supra*, and as a matter of equity and common fairness, is entitled to enforce the bonds to the extent of such value, and it makes no difference whether, as assumed by the Court, the Railway Company is the actor in the suit or not, for there, as here, the suit was to foreclose the mortgage securing the bonds, and decree of foreclosure was ordered for the amount of the value given.

Doubtless the trial Court, notwithstanding the language used indicating that it regarded the pledge as the primary element in the decision, intended to recognize this principle, but it failed utterly, in our view, to award the Railway Company the full value which it parted with for these bonds.

We think in view of the fact that the Railway Company acquired nothing under the Bates & Rogers transaction which it was not entitled to under the original transaction of September 25th, that all the elements of the consideration parted with by the Railway Company should be considered together, and that the Railway Company should have been awarded:

- (1) The \$250,000 cash advanced, with interest.
- (2) The extent of the commitment to Bates & Rogers.
- (3) The value of the second mortgage bonds.
- (4) The value of the stock of the Railway Company.

The first and important element here is the \$250,000 advanced by the Railway Company under the transaction of September 25th. The Court recognized this amount as having been advanced and for which it would under ordinary circumstances be entitled to credit (Supplemental decision *ante*, p. 44). But it subtracted from this apparent credit, the amount still due from Kissel, Kinnicutt & Company under the contract of September, 1911, viz., \$140,000 and decreed reimbursement for only the difference, \$110,000.

(c) *Neither the Railway Syndicate Nor the Railway Company Had Succeeded to the ~~Bonders~~ Bankers' Bankers' Obligation.*

We are unable to understand the legal reason for this deduction. Kissell, Kinnicutt & Company was not the Railway Company syndicate, nor was it the Railway Company. Neither the syndicate nor the Railway had at the time of this transaction assumed the obligation of Kissel, Kinnicutt & Company to purchase the second mortgage bonds of the Power Company. Our argument in this connection must necessarily be negative, and if we are in error in this statement the appellees should point out wherein the record shows the contrary.

The only place where this matter is discussed is on pages 195 to 197 inclusive of the Record, part of which is cited on pages 28 and 29 of the statement herein. On page 195 of the Record, after referring to the Bankers' contract of September, 1911, the witness states:

“Subsequently a syndicate was formed to take over the holdings of Kissel, Kinnicutt & Company in the Power Company, and in other properties which they had acquired and which later became the properties of the Railway Company.”

Further, on the same page:

“The syndicate found itself owning a large interest in the Idaho-Oregon Company * * * The syndicate had two interests, thought it would be wise to turn over all of their interests in the Idaho-Oregon Company to the Idaho Railway Company which they did, taking securities of the same class from the Idaho Railway for securities of the Idaho-Oregon Company, which they turned into the Railway Company.”

On pages 196 and 197, the membership of the syndicate is referred to, it being said:

“This syndicate was composed of a large number of individuals, perhaps fifty or one hundred * * * The syndicate was managed by Mr. Fuller’s firm as syndicate managers. * * * His firm was probably the principal interest in the syndicate, although it was not the largest financial interest.”

From a reading of this testimony it does not seem to us a legitimate inference that the syndicate had succeeded to Kissel, Kinnicutt & Company’s liability to purchase these bonds of the Power Company. Certainly the syndicate could not have been sued for any default of Kissell, Kinnicutt & Company in this re-

spect. Doubtless as a practical matter, it was assumed that as consolidated bonds were received by Kissel, Kinnicutt & Company from the Power Company they would be turned in to the Railway Company, controlled by the syndicate, in exchange for the bonds of the Railway Company, and it is possible that the members of the syndicate were under obligation to Kissel, Kinnicutt & Company to contribute their share of the underwriting of the Power Company's bonds, but all this falls far short of establishing that the syndicate as a whole, or any members thereof, other than Kissel, Kinnicutt & Company, were legally or morally bound to purchase these bonds from the Power Company.

But if we assume that they were so bound still the Court's assumption is in no wise established. The Railway Company was an entirely distinct entity in law and in fact from the syndicate that controlled it. As stated in the testimony from which we have just quoted, stockholders of the Power Company were given the opportunity to exchange their securities in the Railway Company, the witness stating (*Ante*, p. 29): "A circular was sent out to all stockholders of record and a very large proportion of the stockholders so exchanged their stock" Furthermore, it is at least alleged by the interveners and may be admitted that the Messrs. Mainland had surrendered their large interests in the stock of the Power Company for stock in the Railway Company (*ante* p. 11).

It is not necessary, however, that the record affirm-

atively show that the Railway Company was not identical in fact with either the syndicate or Kissel, Kinnicutt & Company. If the Railway Company is to be deprived of a credit on the theory of any such identity in fact, regardless of legal identity, the record should clearly show such identity. It must be admitted that there was nowhere any liability of the Railway Company to assume this contract of the bankers to purchase the consolidated bonds. This being true, the right of the Railway Company to receive credit against these refunding bonds acquired by it under these transactions for the full amount paid or loaned to the Power Company cannot be offset by the existence of any unsatisfied liability of Kissel, Kinnicutt & Company, existing as of that date, to make additional advances on the consolidated bonds.

Assuming, however, the identity of the Railway Company and Kissel, Kinnicutt & Company, as far as this obligation was concerned, was not the substitution of the obligation to advance money upon refunding bonds, an entirely valid consideration for release of the obligation to purchase the consolidated bonds, regardless of questions of fraud which might enter into *other* aspects of the transaction.?

We therefore contend that the Railway Company should have been allowed \$250,000 instead of \$110,000 against these bonds, and that such amount should have been allowed against the bonds as a whole instead of merely against 440 of the bonds.

(d) *Other Elements of Consideration.*

Other elements of the consideration parted with by the Railway Company will require but brief mention, as they are of minor importance. Second in importance, under the contract of December 27th, is the commitment of the Railway Company to Bates & Rogers for \$20,000. True this was but a contingent liability, but if as assumed by the trial Court the consolidated bonds were worthless at the time, it was a liability that was sure to mature. Does the fact then of the present insolvency of the Railway Company deprive this commitment of its standing of consideration to the extent thereof for the bonds received, if any, under the transaction of December 27th? It doesn't appear, admitting the insolvency of the Railway Company, that Bates & Rogers Company can realize nothing upon its guaranty, and the Railway Company is clearly legally liable to Bates & Rogers for \$20,000, if they seek to enforce such liability, whether it can be collected or not.

Second mortgage bonds may be admitted to be of no value upon liquidation of the Company in satisfaction of the claims of the first mortgage. It is not therefore to be assumed, however, that they were not of value in the fall of 1912. In any ordinary reorganization they would have been recognized. The Company's statement at the time showed that some interest was then being earned on them. That is, that there were some earnings over the amount required to satisfy the interest requirements on the first mortgage bonds. The earnings available for fixed charges

for the twelve months of 1912 were \$237,430.16. (Record, p. 226). Approximately \$3,000,000 of bonds including underlying issues prior to the consolidated bonds were outstanding (Record, p. 228). The interest charge at six per cent on these bonds was about \$180,000.00. This would leave available for interest on the second mortgage bonds \$57,000.00, or about 60 per cent of the interest requirements on the consolidated bonds then actually outstanding. True the probability of the Company continuing to earn this interest was, as we have previously stated, remote in view of the immediately approaching competition, but the bonds were not valueless. It was still possible that the competition might be eliminated, and the earnings preserved.

Finally the Court assumed the stock of the Railway Company given to Bates & Rogers to be of no value. There is no evidence as to what it was worth. There had been no public trading in it. The only evidence in the record is the financial statements shown on pages 213 to 218 inclusive, and the admission of its insolvency a year later, as stated on page 381. We do not urge that the Railway Company was in prosperous circumstances either in September or December, 1912, but we submit that it was by no means insolvent and its insolvency if imminent was primarily because of its large investment in Idaho-Oregon securities.

The principal point in pursuing this argument thus far, both as to the stock and to the bonds, is to suggest the unfairness of looking at this transaction in

the light of the sequel and in attempting to judge the reasons and motives for the transaction at the time by their actual result, and in attempting now to adjust the equities as they would have worked out had these transactions not been had.

(e) *The Principle of Ratification.*

This argument leads logically to the question of ratification. The bondholders attacking this transaction are, as we have endeavored to show, standing in the shoes of the Company. But they seek to be excused from the operation of every legal principle which would have bound the company and its stockholders, had they sought to avoid the transaction. They make no objection until after there has been default in their mortgage as well as in the second mortgage, and the future of the Company has been determined by the events which have transpired. They do not offer or attempt to permit the restoration of the status, and they ignore all elements of estoppel. At the time these proceedings were commenced all opportunity of restoring the parties to the situation which they were in, in the fall of 1911 had passed. The transactions were entirely executed, the company had procured all it had bargained for, and the Railway Company could not be put in the situation that it would have been in had these transactions not taken place. In the fall of 1912 the Railway Company could at least have foreclosed its second mortgage upon the properties of the Power Company, and might have been able to reorganize them in such a way as would have preserved for itself

some equity in those properties had it proceeded promptly. By giving the company a new lease of life until the ^{first} ~~new~~ mortgage was in default, whether it acted wisely or not, it has lost all its standing under its second mortgage and is now refused practically all standing under the first. Under these circumstances we are satisfied that the Power Company, or its stockholders would be estopped, to rescind and repudiate these transactions. *Oil Company v. Marbury, supra; Robinson v. McCracken, supra; San Diego Co. v. Beach Co., supra.*

If, however, the Court considers that notwithstanding the impossibility of rescinding the transactions and restoring either the considerations given, or should they be restored, the status existing at the time, we earnestly submit that the Railway Company should be awarded a decree against these bonds for at least the money actually advanced—\$250,000 and interest, and the extent of its commitment, \$20,000—on the Bates & Rogers transaction, for which it is still liable. We are unable to see how, if every other point made is to be disregarded, or the application of the principles refused, the Railway Company should not be accorded this measure of relief.

V.

Errors in the Admission of Evidence.

But brief mention will be made of these. The questioned evidence as shown by specifications of error hereinbefore made is as to financial statements of the Railway and Power Companies. Evidence of

the condition of the Railway Company was admitted as stated in the specifications of error for the purpose of establishing a motive for the transactions. We do not think it tends so to do. Were the Railway Company in most prosperous condition its directors might have been especially eager to prevent that condition from being changed by the loss of value of second mortgage bonds. Were it already in a hopeless condition the same directors might have regarded the Company as not worth saving. Men who are confronted with a loss are naturally desirous of minimizing that loss and preventing it insofar as possible. We have never observed that the temptation is any less whether the man or the corporation is rich or poor, prosperous or otherwise. The errors assigned in this connection are numbers XXIII to XXVII inclusive.

With respect to specification No. XXVIII, we think that the evidence was doubtless competent upon some phases of the case. We do not think as contended by the Court that it tended to show the value of the Company's bonds upon the market, but the matter is not of importance.

Error XXIX relates to evidence of the financial history of the Power Company showing its gross earnings, operating expenses and net earnings for the years 1907 to 1912 inclusive, as shown by its auditors. We cannot see that this has any bearing on the case. Its only purpose must have been to prejudice the view of the Court as to the management of the Power Company by the so-called Railway inter-

ests by showing a more prosperous condition in earlier years. We have very largely explained this in the statement (*ante*, pp. 30, 32), and further by the evidence showing the liabilities of the Company and other financial data on pages 434 to 436 of the record. The allegations of the bill referring to these same matters as to the condition of the Power Company and of the Railway Company were not required to be answered by the defendant companies and no issues were made thereon. The reasons for unfavorable financial showings are various. Neither insolvency on the one hand nor prosperity on the other, nor good nor bad management can be inferred therefrom. Too many other elements enter into the situation. We think that the decision of the Court shows that these financial statements were prejudicial, and being without the issues as framed by the Court the Railway Company had little opportunity to meet them, and to have endeavored to meet them, would have required a mass of testimony as to conditions prevailing in the territory during the different years and comparative methods of bookkeeping, which could not in any way affect any relevant conclusion in the cause.

We do not contend, this being an equity suit, that the decree be reversed and the cause sent back for new trial on account of these errors, if they be such. We mention them simply if this Court deems them to be improper, to exclude them from consideration and to restrict the argument within limits.

This brief has grown to an excessive length for which we must ask the Court's indulgence in view of the importance of the questions involved, both in the legal principles and in the amount in controversy. Analyzed, as we have endeavored to analyze them, the facts are not complicated, nor are the principles contended for difficult of expression or comprehension. The practical situation which is here presented is one by no means of rare occurrence. A company apparently prosperous, but in structure fundamentally unsound, has conducted business for several years, but has become financially involved. An attempt is made by those then in charge of its affairs to meet the situation through a readjustment of securities, and to hold it intact until such readjustment is brought about. Bondholders who believed in the stability of their investment and were encouraged in that belief, as holders of security usually are up to the moment that its default is announced, feel that a fraud has been perpetrated upon them, or their situation would be different. Every expedient devised by those in charge of the Company for the purpose of preventing liquidation of its affairs is construed by the injured bondholders as a fraudulent device intended to rob them of their security. The estate becomes involved in litigation and its enforced liquidation makes reorganization and amicable adjustment between the interests involved impossible. Every act taken by those in charge of the Company's affairs is then construed, not in the light of what was sought to be accomplished; the considerations actuating those in charge with that end in

view are not considered, but an attempt is made to enforce rights and equities on the theory that the Company at the time these acts were taken, was, or should have been, in process of liquidation, and as though those acts were taken in contemplation of that step, instead of in contemplation of escaping such liquidation. Elements of time and possibility are not considered, and the charges of fraud are sustained upon the demonstrated proof of what has happened, instead of in the light of the conditions surrounding the transactions when had. The result is neither legally sound nor equitably just.

We submit that the decree should be reversed.

CAVANAUGH, BLAKE & MACLANE,
Solicitors for Appellants.

JOHN F. MACLANE, *of Counsel.*

United States
Circuit Court of Appeals
For the Ninth Circuit

IDAHO-OREGON LIGHT AND POWER COMPANY, IDAHO RAILWAY, LIGHT & POWER COMPANY and O. G. F. MARKHUS, as Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY,

Appellants,

vs.

STATE BANK OF CHICAGO, BANKERS TRUST COMPANY, F. N. B. CLOSE, A. W. PRIEST, WILLIAM H. FORSTER, H. D. MILES, EDWARD J. MULLER, GEORGE E. FISHER, W. D. WILLARD, Personally and as a Bondholders Committee, W. J. FERRIS, as Receiver of IDAHO-OREGON LIGHT & POWER COMPANY, UNITED STATES OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Appellees.

A. W. PRIEST, W. D. WILLARD, WM. H. FORSTER, H. D. MILES, EDWARD J. MULLER, GEORGE E. FISHER, D. M. LORD, JOHN R. ALLEN, W. O. CARRIER, ALLEN HOLLIS, CHARLES L. PARMELEE and CHARLES M. SMITH, Interveners, and Being a Protective Committee for the Holders of the First and Refunding Bonds of the IDAHO-OREGON LIGHT & POWER COMPANY,

Cross-Appellants,

vs.

IDAHO RAILWAY, LIGHT & POWER COMPANY, O. G. F. MARKHUS, Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY, IDAHO-OREGON LIGHT & POWER COMPANY and W. J. FERRIS, Its Receiver, BANKERS TRUST COMPANY, F. N. B. CLOSE, UNITED STATES OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Cross-Appellees.

BRIEF OF APPELLEES AND CROSS APPELLANTS

A. W. PRIEST, et al, BONDHOLDERS PROTECTIVE COMMITTEE

*Upon Appeal From the United States District Court
for the District of Idaho, Southern Division.*

JOSEPH CUMMINS, Chicago, Illinois

RICHARDS & HAGA, Boise, Idaho,

Solicitors for A. W. Priest, et al.

Filed
FEB 9 - 1915
F. D. Monckton,
Clerk.

United States Circuit Court of Appeals

For the Ninth Circuit

IDAHO-OREGON LIGHT AND POWER COMPANY, IDAHO
RAILWAY, LIGHT & POWER COMPANY and O. G. F. MARK-
HUS, as Receiver of IDAHO RAILWAY, LIGHT & POWER
COMPANY,

Appellants,

vs.

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N. B. CLOSE, A. W. PRIEST, WILLIAM H. FORSTER, H. D.
MILES, EDWARD J. MULLER, GEORGE E. FISHER, W. D.
WILLARD, Personally and as a Bondholders Committee, W. J.
FERRIS, as Receiver of IDAHO-OREGON LIGHT & POWER
COMPANY, UNITED STATES OF AMERICA, IDAHO
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PANY, IDAHO-OREGON LIGHT & POWER COMPANY and
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A. W. PRIEST, et al, BONDHOLDERS PROTECTIVE COMMITTEE

*Upon Appeal From the United States District Court
for the District of Idaho, Southern Division.*

STATEMENT OF THE CASE.

Idaho-Oregon Light and Power Company, a corporation, was organized in the State of Maine in 1907, the promoters and principal stockholders being William and Sinclair Mainland of Oshkosh, Wisconsin, who were engaged in the business of operating public utilities. The company acquired the properties of several smaller concerns operating in southwestern Idaho and eastern Oregon, and serving with electricity for lighting and commercial, mining and irrigating power the cities and towns of Boise,

South Boise, Emmett, Meridian, Payette, New Plymouth, Middleton, Parma, Star, and Weiser, Idaho, and Ontario, Huntington, Nyssa and Gypsum, Oregon, together with agricultural and mining districts included in the same territory. It also operates the water works supplying the village of Ontario, Oregon.

Upon its organization, it executed its deed of trust to the State Bank of Chicago, as trustee, conveying all property then owned and to be thereafter acquired, to secure the payment of bonds to a total authorized issue of seven million (\$7,000,000) dollars, each bond having a denomination of one thousand (\$1,000) dollars. The interest thereon was payable on April first and October first of each year. Five hundred thousand dollars (\$500,000) of these bonds, bearing interest at the rate of six per cent. (6%) were immediately certified and delivered to the corporation, the proceeds thereof to be used for its general corporate business. An additional two million dollars (\$2,000,000) of the bonds, also bearing interest at six per cent (6%) were to be certified from time to time as required, and the proceeds used to construct a power plant at what is known as the Ox Bow Bend of the Snake River, about fifty (50) miles below the City of Huntington, Oregon. Other issues under the mortgage were to bear five per cent. (5%) interest and were authorized to be issued to an amount not exceeding ninety (90%) per cent. of the cost of additions to the property.

With the property originally acquired by the Idaho-Oregon Light and Power Company (which will hereafter, for convenience, be referred to as the Power Company, or the Idaho-Oregon) it obtained a power plant on the Payette River known as the Horse Shoe Bend plant, situate about twenty-five (25) miles straight north of Boise, with an installed capacity of fifteen hundred (1500) kilowatts, and a long term lease on what is known as the Barber plant, belonging to the Barber Lumber Company, and situated on the Boise River about five (5) miles from the city of Boise, and having an installed capacity of nine hundred (900) kilowatts.

The capacity of these plants was sufficient for the needs of the territory served at the time of the organization of the company and for several years thereafter. It was, however, foreseen that the growth of the territory would shortly exceed the capacity of these plants and the construction of the Ox Bow plant was contemplated from the beginning and work thereon was begun in the year 1907. This was a very ambitious project, including a tunnel about eleven hundred (1100) feet in length across the neck of the Ox Bow bend, a dam fifty (50) feet in height across the Snake River, which, at this point, is a wide, deep and rapidly flowing stream, carrying a very large volume of water at all times of the year, and a power plant with an ultimate installed capacity of not less than thirty thousand (30,000) horse power.

The anticipated rapid growth of population and business in the territory served was realized, and the gross and net receipts of the company for the years 1907 to 1912, both inclusive, were as follows:

Year	Gross Earnings	Operating Expenses	Net Earnings
1907	\$189,045.89	\$ 98,586.48	\$ 90,459.41
1908	196,416.16	83,438.80	112,977.36
1909	215,579.57	73,531.31	142,048.26
1910	247,041.43	82,526.01	214,515.42
1911	361,297.47	128,399.62	232,897.85
1912	405,210.21	189,318.10	215,892.11

The demand of its customers reached, and began to exceed, the capacity of the Horse Shoe Bend and Barber plants in the year 1911, when some power was purchased from the Swan Falls plant on the Snake River, which up to the latter part of 1911 was owned by the Trade Dollar Mining Company and which had a transmission line extending to, or near the city of Boise, where it served the Boise and Interurban Railroad, extending from Boise to Caldwell, and owned by the same interests that owned the Swan Falls plant.

The construction of the Ox Bow plant had, in the mean time, been prosecuted, but had not been completed. By the year 1910 the two million (\$2,000,000) dollars allotted for that purpose, under the trust deed to the State Bank, had been exhausted and it was held that no further funds were available under the terms of that mortgage for the purpose of constructing the Ox Bow, and in the fall of

1910 a second deed of trust was given to secure the issue of bonds to the amount of ten million dollars, (\$10,000,000), the proceeds to be used so far as necessary for refunding the bonds issued under the mortgage to the State Bank, and to provide additional funds for the corporate purposes, particularly to complete the construction of the Ox Bow plant. This is the mortgage to the Bankers' Trust Company and F. N. B. Close, named in the title of this cause as appellees.

In the spring or early summer of 1911 the Mainlands opened negotiations with Kissel Kinnicutt and Company, bankers and brokers of New York City, for the sale to them of a large block of the bonds secured by the second mortgage, and, under date of the 19th day of September, 1911, a contract was entered into (Trans. 168-193) between Kissel Kinnicutt and Company, Idaho-Oregon Light and Power Company and William and Sinclair Mainland, of which the principal provisions were the following:

1. Kissel Kinnicutt and Company, styled "The Bankers," should purchase of the Idaho-Oregon Company the second mortgage bonds to the par value of one million five hundred thousand (\$1,500,000) dollars at eighty (80%) per cent. of their par value.

2. That the Bankers should receive as a bonus *upon completing* the purchase of said one million five hundred thousand (\$1,500,000) dollars worth of bonds, one million seven hundred and thirty-six (\$1,736,000) dollars par value of full paid and non-assessable preferred stock of the Power Company

entitled to seven (7%) per cent. cumulative dividends and two million three hundred and seventy-one (\$2,371,000) dollars par value of full paid non-assessable common stock of the Power Company, being a total of four million one hundred and seven thousand (\$4,107,000) dollars par value of stock out of a total authorized issue of ten million (\$10,000,000) dollars, of which two million five hundred and sixty-one thousand nine hundred and sixty (\$2,561,960) dollars was outstanding in the hands of the general public.

3. The agreed effect as to stock holdings was that after the issue of the said stock to the Bankers, the Bankers and the Mainlands were to have substantially equal holdings.

4. The Board of Directors of the Power Company was to be increased from five to eleven; the Bankers were to nominate five, the Mainlands five, and the eleventh was to be mutually agreed upon. There was to be an executive committee of five of whom the Bankers were to nominate two, the Mainlands two, and the fifth was to be mutually agreed upon.

5. The Bankers were to have an option on all the rest of the authorized ten million (\$10,000,000) dollars of bonds under the second mortgage at the same price, namely eighty (80%) per cent of the par value.

6. The bonds under the first mortgage to the State Bank were callable at one hundred and five

(105) and the Bankers had the right to enforce the refunding provisions by requiring the Power Company to call bonds under the first mortgage and to sell to the Bankers at eighty (80) bonds under the second mortgage with which to obtain the funds to call the bonds under the first mortgage.

7. The Power Company was required to purchase of the Bankers any or all of the prior lien bonds (which included not only \$2,494,000 of bonds outstanding under the mortgage to the State Bank, but \$535,000 of underlying divisional bonds which were on separate portions of the property when acquired by the Idaho-Oregon Company) at the call price whenever requested thereto by the Bankers.

8. Trustees selected by the Bankers were to be substituted for the trustees then holding, in the various trust deeds.

9. The purchase of the Swan Falls plant was contemplated and a new corporation was to be organized as a holding company which would take over the Swan Falls plant and such other property as might be purchased and into which should be merged the Idaho-Oregon Company, either by acquiring its stock or by acquiring its property outright by conveyance.

10. The Bankers had the option to purchase any or all of the bonds of the holding company at eighty (80) and have the right to require the new company to purchase from the Bankers any or all of the

prior lien bonds of the Idaho-Oregon Company at the call price.

11. The Bankers reserved the right to reverse the operation and if they saw fit not to organize the new company, had the right to require the Idaho-Oregon Company to take the Swan Falls property, or whatever property they should acquire, off their hands, paying the Bankers therefor with Idaho-Oregon bonds at eighty (80).

Several of these provisions are not directly involved in the later history of this case but a knowledge of them will be useful in the discussion which is to follow.

In making this contract Kissel Kinnicutt and Company were not in fact acting for that firm alone but were acting for a syndicate which Mr. Fuller (of Kissel Kinnicutt and Company) testified was composed of a large number of persons and corporations, the principal members being Kissel Kinnicutt and Company, Winslow, Lanier and Company, the Guaranty Trust Company, the Chase National Bank, and the Bankers' Trust Company, all of New York City. This group will be hereinafter referred to as the "Railway Syndicate."

Within the next few months the things contemplated by the contract of September 19th, 1911, were put into effect with some modifications and additions. The corporation now known as the Idaho Railway Light and Power Company was organized under the laws of the State of Maine, as the holding company, with an authorized capital of thirty mil-

lion (\$30,000,000) dollars, consisting of both common and preferred stock, and an authorized bond issue of thirty million (\$30,000,000) dollars and a deed of trust was given to the Guaranty Trust Company of New York to secure the proposed bond issue. Not only was the Swan Falls plant and its transmission lines to Boise acquired but there were acquired also the Boise and Interurban Railroad, extending from Boise to Caldwell, the Boise Valley Railroad, extending from Boise to Nampa, the Boise Railroad, owning the local street railway system in the City of Boise, the distributing plants in the Cities of Nampa and Caldwell, and about eight (8) miles of electric railroad were built between Nampa and Caldwell to connect the two interurban lines so as to complete a loop.

A general offer to exchange common and preferred stock of the Railway Company for common and preferred stock of the Idaho-Oregon Company was made and such exchanges effected, including the Idaho-Oregon stock held by the Mainlands, so that about ninety-eight (98%) per cent of all the outstanding stock of the Idaho-Oregon Company came into the possession of the Railway Company.

A board of eleven (11) directors was elected by the Railway Company, consisting of the following persons for the Bankers: Albert H. Wiggin, President of the Chase National Bank; S. L. Fuller, of Kissel Kinnicutt and Company; Stacey C. Richmond, of Winslow Lanier and Company; John D. Ryan, President of the Montana Power Company; and

Charles H. Sabin, Vice-President of the Guaranty Trust Company; and the following persons representing the Mainlands and other interests in the Power Company: William Mainland and Sinclair Mainland, of Oshkosh, Wisconsin; Grant Fitch, of Milwaukee, Wisconsin; Ralph M. Burtis of Chicago, and A. E. Thompson of Oshkosh, Wisconsin. For the eleventh director there was elected Mr. Robert W. Watson, who was suggested by Mr. Fuller, and who was in some way associated with Mr. Fuller. The executive committee of five (5) was composed of Mr. Fuller and Mr. Wiggin, the two Mainlands, and Mr. Watson.

The property continued under the management of the Mainlands until some time early in 1912, when the position of "Managing Director" was created and Mr. Watson appointed thereto and Mr. Watson was put in substantially entire charge of the management of all properties.

The Railway Company, exercising its power as the holder of substantially all of the stock of the Idaho-Oregon Company elected its entire Board of Directors to be the directors of the Idaho-Oregon Company. Mr. William Mainland was made President of both companies and Mr. G. E. Hendee, who was private secretary to Mr. Fuller, was made Secretary and Treasurer of both companies.

By December, 1912, the Railway Company had outstanding (Trans. 208) more than \$12,000,000 of common stock, \$3,500,000 of preferred stock, \$6,000,000 of its own first mortgage bonds, nearly \$1,-

500,000 of underlying bonds on properties acquired other than the Idaho-Oregon, and about \$362,000 of current floating indebtedness, or a total interest bearing obligation of more than \$7,500,000 on which the fixed charges were more than \$375,000 per annum. Their operating report for the twelve months ending December, 1912, showed the sum available for fixed charges to be \$246,139.74. In this, however, was included \$44,898.43 of non-operating revenue which was in fact composed almost wholly of interest on the second mortgage bonds of the Idaho-Oregon Company, which subsequent events brought about by the Railway Company, wholly eliminated, leaving about \$200,000 ostensibly available with which to pay fixed charges of \$375,000.00. This \$200,000.00 however included uncollected and uncollectible items to a substantial amount so that the actual income available to meet these fixed charges was less than \$200,000.00.

On September 25th, 1912, a meeting of the Directors of the Idaho-Oregon Company was held in the Chase National Bank, New York City. (Trans. 233). The call for the meeting gave no notice of the character of the business to be transacted. Of the five western members three only were present. These were the two Mainlands, who were the President and Vice-President respectively of the company and Mr. Thompson, of Oshkosh, who was the personal counsel of the Mainlands and had been and still was in some matters the counsel of the company. They had no information prior to the meet-

ing of the program which was presented (Trans. 302, 309 and 319). In addition to the three persons mentioned, there were present (Trans. 333) Messrs. Wiggin, Sabin, Fuller, Watson and Richmond. Mr. William Mainland acted as chairman of the meeting and Hendee is said by the minutes to have acted as secretary though he did not so act in fact. The business was transacted by Mr. Wickes, the company's New York counsel (who was also the private counsel for Mr. Fuller) who presented and read a previously prepared draft of minutes which included proposed contracts, notes, resolutions and results of the votes on the resolutions (Thompson deposition, Trans. 289 et seq). There was a proposed agreement between Kissel, Kinnicutt and Company and the Idaho-Oregon Company and William and Sinclair Mainland (Trans. 236-241) to the following effect:

1. The Company released the Bankers from their agreement of September 19, 1911 to purchase \$1,-500,000.00 of second mortgage bonds, the Bankers having up to that time taken \$1,325,000.00 and the contract being unfulfilled as to \$175,000.00 which, if fulfilled, would give the company an additional \$140,000.00 in cash.

2. The Bankers were to "procure" the Railway Company to loan to the Idaho-Oregon Company \$250,000.00, taking its notes at six (6%) per cent., secured by the pledge of Idaho-Oregon first mortgage bonds to the par value of \$500,000.00.

3. The Idaho-Oregon Company was to receive back from the Railway Company which now held them second mortgage bonds of those purchased by the Bankers up to the amount of \$500,000.00 and give in place thereof first mortgage bonds out of its treasury, of the same par value.

Although William and Sinclair Mainland were to be parties to this proposed agreement they both testified that they had not been consulted with reference to this proposal and had heard nothing of it until they went into the meeting. (Trans. 317, 319).

The record says that a resolution to enter into the said arrangement "was unanimously adopted with the exception of Mr. Fuller's and Mr. Sinclair Mainland's votes, which were not cast." Mr. William Mainland, Mr. Sinclair Mainland and Mr. A. E. Thompson all testified (Trans. 309, 319, 293) that Mr. Thompson voted in the negative, Mr. Sinclair Mainland voted in the negative, and Mr. William Mainland did not vote.

There was then presented a proposal from the Railway Company to advance \$250,000 upon the notes of the Idaho-Oregon Company with first mortgage bonds as collateral, with the further provision that the Idaho-Oregon Company would exchange with the Railway Company, dollar for dollar and bond for bond, not to exceed \$500,000 of Idaho-Oregon first mortgage bonds for Idaho-Oregon second mortgage bonds then held by the Railway Company.

The meeting then proceeded to take action with the view to obtaining from the State Bank, Trustee

under the first mortgage, the certification of additional first mortgage bonds to be used in the proposed exchange.

After the beginning of the foreclosure proceedings, of which this litigation is a part, and after the intervention of the appellees in said foreclosure proceedings, the depositions of Mr. Wiggin, Mr. Sabin, Mr. Richmond, Mr. Fuller and Mr. Watson were all taken at New York in November, 1913, (Trans. 273-279, 283-289). None of the witnesses had any recollection as to what especially was to be done with the \$250,000. They recalled no program looking to the permanence and stability of the enterprise that was to be carried out with the money thus obtained and could recall no reasons for the action then taken except that, as they understood it, the company was in need of money. Mr. Watson, the Managing Director, said the company was being pressed for money but, as he remembered it, nothing particular stood out. (Trans. 273). The other witnesses recalled that the transaction was recommended by the Managing Director, but did not recall any special reasons advanced in favor of it.

The money was actually advanced to the Idaho-Oregon Company as follows:

October 4, 1912	\$100,000.00
November 1, 1912	20,000.00
December 11, 1912	60,000.00
December 17, 1912	40,000.00
January 3, 1913	30,000.00

On the 27th day of September, 1912, two days later, there was held at the office of Kissel, Kinnicutt and Company, 14 Wall Street, New York City, a meeting of the executive committee of the Idaho-Oregon Company, at which there were present the two Mainlands, Watson and Fuller. There was adopted and authorized a proposed agreement (Trans. 251-256) to be entered into between Kissel, Kinnicutt and Company, the Idaho-Oregon Company, the Mainlands and the Railway, which, after reciting certain features of the contract of September 19, 1911, mutually released and discharged the various obligations of the contract referred to as the "Syndicate Contract", except as they were expressly, or by reference, continued in force, continued the option to the Bankers to purchase Idaho-Oregon second mortgage bonds at eighty (80), assigned the said option to the Railway Company, released the Bankers from taking the remaining \$175,000, substituted the Railway Company for the Bankers in the covenants respecting the taking up of prior lien bonds, and gave the Railway Company the right to take first mortgage bonds instead of seconds, at its election.

The interest on the first mortgage bonds due October 1, 1912, was paid. The interest on the second mortgage bonds was due November first. No exchanges were made prior to that time and this interest was collected by the Railway Company.

The corporate records containing the minutes of the meetings of the directors and executive commit-

tee of the Idaho-Oregon are found in a loose leaf book which was in charge of Mr. Hendee, the secretary. In this book are certain typewritten sheets containing the alleged record of a meeting of the executive committee of the Idaho-Oregon Company held in the Chase National Bank, December 27, 1912, at which, according to the alleged record (Trans. 400-413), all the members of the executive committee were present, which recites that Mr. William Mainland acted as chairman and Mr. Sinclair Mainland as secretary. The minutes are not signed. Mr. Sinclair Mainland testifies (Trans. 320) that he did not recall ever having seen the record of that meeting until the day before his testimony was taken in this cause, in May, 1914, and that he first learned of the agreement for the further exchange of bonds in connection with the Bates and Rogers settlement only a day or two prior to the taking of his deposition. He did not recall having had any information as to additional bonds having been traded or put out as stated in these minutes. Mr. Forsyth Wickes, attorney in New York City, for the Idaho-Oregon Company under the Fuller-Watson management testified (Trans. 424) that he wrote up the minutes of the meeting of December 27th and that he had no specific recollection whether he sent out those minutes to the members of the executive committee or to the alleged secretary, Mr. Sinclair Mainland, or not, and that he did not remember that anybody but himself kept notes of the minutes of the meeting of December 27th.

The alleged record of December 27th was admitted over the objection of the appellees.

According to this record, (Trans. 400), a certain settlement was made between the Idaho-Oregon and Bates and Rogers Construction Company, which had been doing some work at the Ox Bow, and as a part of said settlement Bates and Rogers accepted twenty-five thousand dollars (\$25,000) of the second mortgage bonds of the Idaho-Oregon at 80 in payment of twenty thousand dollars (\$20,000) of their claim, the payment of the said bonds being guaranteed by the Railway Company. In addition thereto the Railway Company was to give to Bates and Rogers one hundred (100) shares of its common stock and fifty (50) shares of its preferred stock, the shares having a par value of one hundred (\$100) dollars.

In consideration of this guaranty and the delivery of the stock (upon which no stated value seems to have been placed in the transaction) the Idaho-Oregon agreed to make a further exchange of first mortgage bonds in its treasury, or to be thereafter certified, for its second mortgage bonds held by the Railway Company up to the par value of \$500,000, making a total authorized exchange of bonds having a par value of \$1,000,000.

Mr. William Mainland testifies that he had conducted a part of the negotiations with Bates and Rogers for a settlement with them and had arranged such a settlement, that Rogers was willing to take the Power Company's first mortgage bonds at the market price (Trans. 314) but absolutely refused to

take the consolidated bonds without a guaranty; that he discussed the matter with Fuller and Fuller refused to give Bates and Rogers first mortgage bonds but was willing to give them the seconds and the Railway guaranty, but that nothing was said between himself and Fuller about the Railway Company getting a further exchange of bonds as compensation for the guaranty. The witness had no recollection of such action having been taken at the meeting of December 27th, as appears in the alleged record of that meeting. (Trans. 314).

A part only of the first mortgage bonds proposed to be exchanged were at the time certified or in the treasury of the company, but certifications were obtained from the trustee, the State Bank, from time to time until a total of seven hundred and eighteen (718) bonds had been made available and all of these bonds were exchanged under these agreements, subsequent to January 1, 1913. The company was demanding further certifications of first mortgage bonds and the trustee, the State Bank, did certify an additional one hundred and seven (107) bonds on or about the 10th day of April, 1913 after default had been made in the payment of interest on the issue. Four days later an agreement was made pledging these 107 bonds as collateral and they also were delivered to the Railway Company under that pledge.

For the sake of the connection, reference is here made to the fact that, as it appears from disconnected portions of the record, the Railway Company was insolvent, was placed in the hands of a receiver

on December 23, 1913, that its property will not meet the claims of its first mortgage bond holders; that the claim of Bates and Rogers on the guaranty can not therefore be in fact enforced, and that the stock given as a part of the transaction of December 27, 1912, is worthless.

On February 24, 1913, a meeting of the directors of the Idaho-Oregon Company was held at the Chase National Bank, New York City. (Trans. 349). There were present Messrs. Wiggin, Fuller, Watson, Sabin, Ryan and Sinclair Mainland. At this meeting Mr. Sabin, Mr. Wiggin, Mr. Fuller, Mr. Ryan and Mr. Richmond resigned as directors of the Idaho-Oregon Company and Mr. Hendee, Judson H. Morey, Edward J. Wolff, Milton H. Greenwalt, and John James McGirl were elected their successors. Mr. Sabin was the Vice-President of the Guaranty Trust Company of New York, Mr. Hendee elected as his successor, was Mr. Fuller's private secretary; Mr. Wiggin was President of the Chase National Bank, Mr. Morey, his successor, was an employee of Winslow, Lanier and Company; Mr. Fuller was a partner of Kissel, Kinnicutt and Company, his successor, Mr. Wolff was a bookkeeper of Kissel, Kinnicutt and Company; Mr. Richmond was a partner in Winslow, Lanier and Company, his successor was an auditor in the office of Watson, the Managing Director; Mr. Ryan was president of the Amalgamated Copper Company and a director in several banks, Mr. McGirl, his successor was an employee of Winslow, Lanier and Company.

On April 1, 1913, the Idaho-Oregon Company defaulted in the payment of the semi-annual interest on its first mortgage bonds due that day. Under date of March 26th, a circular letter went out to all the bondholders (Trans. 80-89) under the names of Charles E. Boekus, of the Old Colony Trust Company of Boston, L. B. Franklin, of the Guaranty Trust Company of New York, Samuel L. Fuller, of Kissel, Kinnicutt Company of New York, William Mainland of Oshkosh, Wisconsin, Homer W. McCoy of McCoy and Company, brokers, Chicago, Daniel E. Pomeroy, of the Bankers Trust Company of New York and Stacey C. Richmond of Winslow, Lanier Company of New York, as a committee, accompanied by a deposit agreement signed by the same persons as a bondholders protective committee. The agreement provided for the deposit with the persons named, as a protective committee, of the first mortgage bonds of the Idaho-Oregon Light and Power Company, with the usual plenary powers granted to such committees, and set forth a plan of re-organization whereby all the property of the Idaho-Oregon Company was to be acquired by the Railway Company subject only to certain underlying divisional bonds then amounting to \$534,000.00 and to give to the holders of the \$2,494,000.00 of Idaho-Oregon first mortgage bonds in the hands of the public five per cent (5%) bonds of the Railway Company secured by what was termed an adjustment mortgage, the interest thereon to be paid only as earned and to be non-cumulative. This mortgage was subject to

all the underlying divisional mortgages of the Railway Company and to its general first mortgage above referred to. The amount of Railway first mortgage bonds to which the adjustment mortgage was subject was stated to be \$4,500,000.00 "when acquired" but the Railway Company's first mortgage was, in fact an open mortgage with an authorized issue of \$30,000,000.00 and it was not proposed to be closed.

The deposit agreement (Trans. 65) recited that it was "understood" that the earnings of the Power Company during the previous six months were not sufficient to pay the coupons on the first mortgage bonds about to mature April 1, 1913, and that (Trans. 66) "*in order to avoid a foreclosure of the mortgage securing said bonds and to procure additional capital for the Power Company the following plan has been evolved for the adjustment of the finances of the Power Company*". The circular accompanying the plan (Trans. 80) declared that the Railway Company owned \$718,000.00 of the Power Company's first mortgage bonds, \$854,000.00 of its second mortgage bonds, \$250,000.00 of its notes and nearly all of its stock and that on account of its large holdings of the Power Company's securities and its dominant position as the owner of large consumers of power in the territory served by the Power Company, the co-operation of the Railway Company was essential to the success of any plan for the readjustment of the affairs of the Power Company.

The circular further stated that the signers above named had been "designated as a protective committee" to carry out said plan and they invited the deposit of the Idaho-Oregon first mortgage bonds under the terms thereof.

Some weeks went by and comparatively few of the Idaho-Oregon first mortgage bonds had been deposited with this committee, whereupon various brokers and bond dealers who had been concerned in the sale of the Idaho-Oregon bonds in former years before the advent of the New York syndicate in its affairs, were invited to New York for a conference and remained in New York for two weeks, having their expenses paid, and numerous conferences were held with Mr. Fuller and the committee's counsel, Mr. Eldon Bisbee, with the result that a modification of the plan was framed and initialed by the persons attending the conference. The testimony of Mr. Fuller on this subject (Trans. 466-475) was refused admission by the trial court and is found in the supplemental statement of evidence by the cross-appellees. This modification was only to the effect that the adjustment bonds to be given to the Idaho-Oregon bond holders instead of being a non-cumulative income bond should have a fixed rate of interest beginning at two per cent (2%) and gradually advancing to five per cent (5%). These brokers, who had been in correspondence with their customers, respecting the situation, then, for the most part, advised their customers to deposit their bonds with the New York committee.

Mr. Fuller testified, upon cross-examination in this cause, (Trans. 475) that he agreed to pay, and did pay commissions to several of the brokers for obtaining the deposit of bonds of their customers with the New York committee.

By the first of June, 1913, the New York committee had on deposit more than two-thirds, of the bonds (counting the 718 exchanged bonds as a part of the bonds on deposit) and instituted proceedings, under the terms of the trust deed, by making a written request of the trustee as the holder of more than two-thirds of the bonds (Trans. 375) to begin foreclosure proceedings, although the preamble of the deposit agreement recites that the plan proposed to avoid foreclosure. The bill to foreclose was filed in the District Court of the United States for the Southern District of Idaho, by the State Bank of Chicago, as complainant, on July 7, 1913. The return day of the summons was August 11, 1913, and on that day a decree was presented, accompanied by evidence taken by deposition prior to the return day. On August 14th the interveners filed their petition for leave to intervene, ~~in support of the bill.~~ On August 20th a decree of foreclosure and sale was entered against the objection of the interveners, the Court, however, specially reserving the power and authority to permit intervention and to make such modifications in the decree as justice might require.

On the 30th day of August, 1913, the appellees, constituting a Bondholders' Committee which had been organized at Chicago for the purpose of protecting the interests of the bondholders in the premises filed a further petition for leave to intervene and their intervention was vigorously opposed by the trustee and the Idaho-Oregon Company. After some preliminary efforts on the part of interveners, the matter was set for September 15th, 1913, and after a hearing in open court lasting several days the court entered an order on September 19th (Abst. 55) permitting the appellees to intervene for certain specified purposes expressed as follows: (Trans. 56) "2. That the complainant and the defendant Idaho-Oregon Light and Power Company are required to answer all of the allegations in said Bill in Intervention relating to the 718 bonds, aggregating \$718,000.00 par value, secured by the first and refunding mortgage upon which foreclosure is sought here, which bonds are alleged to have been obtained by the Railway Company in exchange for so-called consolidated or second mortgage bonds, and that the said defendant Power Company make full disclosures with reference to its transactions in, and dealings with, and the present location, ownership, and control of the 107 bonds certified after April 1, 1913, and also in like manner answer relative to the 520 first mortgage bonds included in the 2124 bonds referred to in paragraph XIV of the Bill of Intervention.

3. That the Idaho Railway Light and Power

Company be, and hereby is, made a party, for the purpose of answering the allegations of the said Bill in Intervention respecting the said 718 bonds, and that subpoena issue accordingly”.

Subsequently by stipulation, issues relative to the 520 bonds were dismissed from further consideration and issues relative to the 107 bonds, except as to the propriety of their certification, were left to be tried in another proceeding, so that the issues tried in this proceeding related to the status of the 718 bonds and to the propriety of the certification of the 107 bonds.

The Bill in Intervention (Trans. 5) makes the following allegations, aside from the formal ones and matters already stated:

1. That the interveners own first mortgage bonds of the Idaho-Oregon Light & Power Company to the amount of \$137,000.00; that there had been deposited with them as a bond holders committee, in addition thereto, bonds to the amount of \$224,000.00 and that persons who had already deposited their bonds with the New York committee had deposited with the interveners their certificates issued by the depositors^{owners} of the New York committee representing bonds to the amount of \$71,000.00 the total amount thus held and represented being \$432,000.00 at the time of filing the bill.

2. That the Power Company was organized under the laws of the State of Maine in 1907, with an authorized capital of \$7,500,000.00 afterwards in-

creased to \$10,000,000.00 and that the persons principally concerned therein and who became its chief stockholders and its President, Secretary and members of its Board of Directors were William and Sinclair Mainland; that it proceeded to acquire the properties above described and to construct the power plant on the Ox Bow bend of the Snake River; that the company enjoyed a large and rapidly increasing gross and net income until and including the year 1911, and that it paid the interest on all of its outstanding indebtedness from time to time issued from 1907 until 1911 inclusive and that official audits showed a surplus above the requirements for operating expenses and interest, and that in the years 1908, 1909, 1910, the Power Company paid out of its surplus \$91,152.17 in dividends upon its stock.

3. That in 1911 the company, for the purpose of obtaining additional money with which to complete the Ox Bow plant, entered into the contract with Kissel, Kinnicutt and Company, an inspection of which had been requested of the Power Company by the interveners and refused. (This is the contract above referred to).

4. The bill then describes the organization of the Railway Company, its acquisition of control of the Power Company and its acquisition of the various properties, to-wit: The Swan Falls plant, the traction properties, etc.

5. That prior to the acquisition of the said properties by the Railway Company, the Boise Valley Railroad was a customer of the Power Company and

that its business had been taken away from the Power Company and turned over to the Railway Company thus reducing the income of the Power Company and its ability to meet its obligations to the interveners and other bondholders; that the Boise Railroad, being the local street car system of the City of Boise, was under contract for a term of years to purchase its power of the Power Company, upon terms highly profitable and advantageous to the Power Company, and that immediately upon its acquisition by the Railway Company, the latter caused the contract to be cancelled and transferred the business to the Railway Company, thus again reducing the income and business of the Power Company; that in other ways the Railway Company was pursuing the policy of throttling the Power Company and absorbing its business.

6. That the Railway Company had issued \$6,500,000.00 of bonds, all of which had been purchased or contracted to be purchased by Kissel, Kinnicutt and Company with the purpose of re-selling the same to the public; that the bonds had not in fact been sold, and had not been marketable for the reasons set forth in the bill; that Kissel, Kinnicutt and Company not being able to dispose of the bonds to the public had pledged the bonds to various banking institutions for securities for loans and that such bonds were held in large quantities by the Guaranty Trust Company of New York, the Bankers Trust Company of New York, the Chase National Bank of New York, Winslow, Lanier and Company of New York,

and the First National Bank of New York; that the reason why Kissel, Kinnicutt had not been able to dispose of the bonds to the public was that the property acquired by the Railway Company had not been profitable and was not earning sufficient to meet their operating charges, to make provision for depreciation and pay interest upon the excessive and exorbitant prices paid for the properties; that Kissel, Kinnicutt and Company and their associated banks had then been carrying this load for nearly two years and that it became clearly necessary to consummate the plan of acquiring the property of the Power Company in such a manner as to get additional security behind the bonds of the Railway Company, and especially to show added earning capacity, in order to render the Railway bonds marketable and avoid an enormous loss on the \$6,500,000.00 of such bonds; that the readily available course was to get rid of the first mortgage bonds of the Power Company by the easy device of foreclosure, at which there would be, and could be no bidder except the Railway Company and thus seize the property and earnings of the Power Company.

7. That the purpose of the Power Company and the Mainlands in executing the second mortgage and in contracting for the sale of \$1,500,000.00 of bonds thereunder to Kissel, Kinnicutt and Company was to obtain funds for completing the Ox Bow, which would have provided the Power Company with ample power and enabled it to largely increase its earnings; that Kissel, Kinnicutt and Company contrary

to the provisions of their agreement and in violation of the rights of the Power Company performed the same only in part, and being in control of the Power Company caused the latter, without consideration, to release them, the said Kissel, Kinnicutt and Company from the contract at a time when it was impossible to obtain funds from other sources; that although the purpose of the second mortgage and the sale of the \$1,500,000.00 bonds secured thereby was to obtain funds to complete the Ox Bow plant, the money actually received by the Power Company from such bonds was not in fact applied to the completion of the Ox Bow plant but was, under the domination and control of the Railway Company, diverted to other purposes to the great injury of the Power Company and the interveners charge that this was done in pursuance of the scheme to reduce and divert the income of the Power Company, break down its credit, cause it to default, and to purchase its property for a nominal sum to the fraud and injury of the holders of the first mortgage bonds of the Power Company.

8. The interveners then showed that the Power Company showed a constantly increasing surplus each year from the organization of the company down to 1911, over its requirements for operating expenses, maintenance and bond interest until 1912, during which year it had been under the control of the Railway Company, when a surplus in 1911 of \$146,532.52 was converted into a deficit in 1912 of \$59,654.28 (Trans. 17); that the Railway Company

obtained complete domination and control of the Power Company in the latter part of 1911 and exercised that control for the first complete year during 1912; that in 1912 the operating expenses increased 55% over those of 1911 while there was an increase of only 11% in operating income; and that in 1911, during only a part of which the Railway Company had control, the commercial and general expenses were 130% more than they were in 1910, while the business increased only 20%; that the control and domination of the Railway Company over the Power Company is thus shown to have been destructive of its business and income and an attack upon the security of the bonds held by the interveners, and it is charged that such control and domination were exercised for the purpose of depreciating such securities and enabling the Railway Company to carry out the scheme of acquiring the Power Company's property; that the defaulting interest, the proposed re-organization and the suit to foreclose are all part of that scheme.

9. The bill then sets out the names and connections of the persons constituting the New York re-organization committee and shows that three members of the committee were representatives of banking concerns interested in the organization of the Railway Company and large holders of its stock and bonds either as pledgees or otherwise and not in any way interested in the first mortgage bonds of the Power Company; that a fourth, Fuller, was the chief promoter and controlling factor in the Railway Com-

pany, and a fifth was the President of the Railway Company; that no member of the committee, as the interveners were informed, and believed, with the possible exception of Fuller had any interest whatever in the first mortgage bonds of the Power Company, but that the committee was selected and appointed wholly by, and in the interests of the Railway Company and for the purpose of promoting and protecting those interests and not in any sense, manner, or degree in the interests of or for the protection of the holders of the first mortgage bonds of the Power Company and that the pretense that they were appointed by or acting on behalf of such bond holders or representing the interests of such bond holders was false and fraudulent and intended to deceive and mislead the bondholders and forestall any action by the bond holders in their own interests, which would otherwise have taken place after the occurrence of the default.

10. That subsequent to the putting out of the first plan and prior to putting out the modification of May 1, 1913, Fuller as chairman was requested, by addition, or substitution, to place on the said committee actual bond holders nominated or selected by the holders of the Power Company's first mortgage bonds and that Fuller refused such request; that the deposit of the Power Company's bonds with the New York Committee had thus been obtained by fraud, misrepresentation, and deceit, and that they were not as respects any proceedings in a court of equity entitled to be recognized as representing said bonds

and that the trustee, the complainant in the foreclosure, being now charged with full knowledge of the character and purpose of the said committee had no right to act at the instance or upon the demand and request of the said committee as representing the bonds so obtained by such misrepresentation, fraud and deceit.

11. The Bill then sets out the circular and plan of March 26th, 1913, the failure of the New York Committee to obtain the deposit of any considerable number of bonds, the visit of the brokers who had sold the Power Company's bonds to New York at the invitation of the New York Committee, the adoption of the revised plan of May 1, 1913, the advice of the brokers to their customers to deposit their bonds with the New York committee and the peculiar relation between the broker and his customer and the dependence by the customer upon the broker for information and advice in such a situation as was thus created.

12. The bill then sets out the organization of the committee of bondholders in Chicago, which will be referred to as the Priest Committee, the present appellees, that it was created primarily for the purpose of obtaining information as to the character, value and prospects of the Power Company's properties, the reason for the alleged default and the character, value, and prospects of the properties of the Railway Company upon which a second mortgage was offered them in exchange for their first mortgage on the property of the Power Company; that they sought

this information of the New York committee, the Power Company, of the Railway Company and of Kissel, Kinnicutt and Company, but for the most part such information was refused and denied; that they were refused the right to inspect the books of record of the Power Company, the books of record of the Railway Company, the names of the persons who were directors of the Power Company, the names of the persons who were directors of the Railway Company, the names and addresses of their fellow bondholders, with whom they desired to communicate for their mutual protection, the operating reports of the Railway Company, and the operating reports of the Power Company subsequent to January 1, 1913, all of which information was in the possession of one or more, or all, of the persons and corporations named, and should have been freely supplied to the bondholders in connection with the proposal of the New York committee.

13. That the exchange of \$718,000.00 of first mortgage bonds by the Power Company for second mortgage bonds previously purchased and held by the Railway Company was without consideration, that the second mortgage bonds, in view of the default and foreclosure then planned and anticipated at the time of exchange had no market value and were to all intents and purposes worthless and the exchange was, as to the interveners and the Power Company, fraudulent and wrongful, and that the said \$718,000.00 of bonds were not under the cir-

cumstances issued and outstanding and valid obligations of the Power Company.

14. That on or about the 10th of April, 1913, the Power Company, acting under the domination, authority and demand of the Railway Company, caused the Trustee to certify and deliver to it \$107,000.00 of first mortgage bonds, being a part of the \$3,319,000.00 of bonds alleged by the Bill of Complaint in foreclosure to be outstanding; that at the time of such certification the bonds in question had already been dishonored by default in the payment of interest and that the certification of such bonds was improper and unauthorized; that although alleged by the bill to be outstanding and valid obligations of the Power Company, the said 107 bonds were not in fact so outstanding but had never been sold or passed into the hands of bona fide owners for value, and were not a part of any valid obligation under the trust deed.

15. That according to the allegations of the bill to foreclose, there were outstanding \$1,770,000.00 of second mortgage bonds of the Power Company; that all but \$166,000.00 of those had been issued since the Railway Company came into the control of the Power Company and that all except the said \$166,000.00 were in the hands of Kissel, Kinnicutt and the Railway Company; that in spite of the enormous increase of indebtedness of the Company incurred ostensibly for the completion of the Ox Bow, very little had in fact been done upon the Ox Bow and that such expenditure as had been made was ineffective and wasteful, while during the same time

the Railway Company had spent large sums in developing and increasing the capacity of the Swan Falls plant, belonging to the Railway Company, and that Fuller, in stating reasons why the first mortgage bond holders of the Power Company should submit to the demands of the Railway Company as put forth by the New York Committee, had declared that if the bondholders did not submit to such plan, the plan of reorganization would be abandoned, the Swan Falls plant would be enlarged and the Railway Company could and would take away the business of the Power Company.

16. That the Ox Bow was a large project on account of which \$2,000,000.00 of bonds had been issued prior to the contract with Kissel, Kinnicutt and Company; that it contemplated the creation of an enormous amount of power, amounting to thirty-five or forty thousand horse-power; that if the Ox Bow had been completed as planned and for which ample financial resources had been actually created, the present situation of the Power Company could not have been brought about and the interveners charged that the failure of the persons in control of the Power Company since 1911 to complete the Ox Bow project was deliberate and for the purpose of wrecking the Power Company and obtaining its property for a nominal sum; that Fuller, as chairman of the New York committee was attacking and seeking to depreciate in public estimate the Power Company's property although acting or pretending to act as the chairman of the committee for the pro-

tection of the bondholders, and while retaining possession and control of the first mortgage bonds deposited with him as a trustee for, and in protection of the interests of the owners thereof, he had openly and violently attacked the interests of those bondholders so as to depreciate the value of their securities and had used every means in his power to prevent the sale of the property at an adequate price.

17. That the property of the Power Company consisted of divers and scattered units, much of it portable and movable, and some of it shifting and changing in its character; that its business consisted in furnishing electric current for light and power in a large number of communities and to an extremely large number of individuals and corporations, that its income was derived wholly from the furnishing of such current; that a large share of its business was conducted in competitive territory where competitors could and did obtain the customers and supply their wants immediately, if the Power Company should for any reason fail or refuse to do so; that it was impossible for any person outside the Railway Company and the Power Company, which was under control of the Railway Company to know or determine without assistance of persons connected with those companies, what the property of the Power Company is, or of what it consisted, and that it was impossible for the court to determine, except by the appointment of a receiver and by the inspection, assembling and scheduling of the property by such receiver, to know what was to be sold under any de-

cree of foreclosure or sale, or as to what and where the property was which is to be delivered to any purchaser thereat; that if a decree of sale were entered and the property remained in the hands of the adverse interests then in possession thereof much of the property could be easily sequestered, concealed or disposed of, and the contracts upon which the business and income of the Power Company depended, and without which the Power Company itself was of small value, could be terminated, and abandoned, and their value lost and destroyed; and that it was absolutely impossible that there should be an identification, scheduling, valuation, inspection or exhibition to purchasers without first placing the property in the power and possession of the court through a receiver.

18. The concluding paragraph XIX of the Bill of Intervention is as follows (Trans. 39):

“The interveners respectfully show that by means of the premises, the Power Company has passed under the domination and control of the Railway Company, which is a competitor and whose interests are adverse to the interests of both the other stockholders and of the creditors of the Power Company; that under the domination and control of the Railway Company the Power Company has been and is being stripped of its business and income, and its expenses enormously and improperly increased for the express purpose of depreciating and finally sequestering the property of the Power Company constituting the security of these interveners and its other cred-

itors; that conspiring and contriving to bring about a foreclosure of the first mortgage upon the property of the Power Company, not for the purpose of protecting the interests of the creditors secured thereby but solely for the purpose of obtaining the property of the Power Company at a nominal price and adding it to the property of the Railway Company, and thus adding to the value of the securities held by the persons in control of the Railway Company, the alleged default of April 1st, 1913, was brought about; that this default, while actual as to these interveners and other bondholders not assenting to the plan of re-organization devised by the Railway Company for its purposes and profit, was nominal as to the bonds controlled by the Railway Company, and that as to such bonds the interest has actually been paid; that under the control and domination of the Railway Company an actual consolidation of the property of the Power Company with the property of the Railway Company has been, to all intents and purposes, effected, so that the same persons are executive officers, managers and superintendents of both properties, to the manifest injury of the Power Company and its creditors; that if a foreclosure and a sale of the properties of the Power Company be had at the present time and under the circumstances now existing, it will not result in the payment of the debts of the Power Company, but will result in the sacrifice of its property and in the loss of the security of its creditors, and will redound only to the benefit of the Railway Company, which has planned and now seeks

to carry out such foreclosure, and which intends, as shown by the said plan of re-organization, to be the only purchaser at such sale, and which openly boasts that nothing can be done with the property of the Power Company except by its consent and co-operation; that it is absolutely essential to the protection of the Power Company's property and its creditors that the property of the Power Company be forthwith segregated from the property of the Railway Company and removed from the domination and control of the Railway Company. That unless this court by appropriate action takes possession and control of the property of the Power Company and removes it from the adverse possession of the Railway Company, its value will inevitably be sacrificed and destroyed. That the persons now in control of the Power Company, to-wit: the Railway Company, Kissel, Kinnicutt and Company, and William and Sinclair Mainland, either directly or through their ownership of the stock and securities of the Railway Company, are largely indebted to the Power Company upon stock which has been improperly and fraudulently issued to them without consideration therefor, and that it is through such stock so improperly and fraudulently issued to them that they have obtained and exercise the control and domination over the Power Company above referred to. That if the Power Company can recover and be put in possession of the moneys lawfully due it for this stock, which, to the amount of millions of dollars, has been issued as fully paid for but actually without being

paid for at all, it will be enabled to meet all its just obligations and carry on its business successfully and profitably. That there has been, as above shown issued by several devices bonds of the Power Company to the amount in one case of \$107,000.00, and in another case to \$718,000.00 which are alleged to be valid and outstanding obligations of the Power Company, but which in fact are not such valid and outstanding obligations, which should be surrendered and cancelled and if so surrendered and cancelled would thereby greatly reduce the alleged obligations of the Power Company and the interest charges against its income. That to properly protect the interests of these interveners and other creditors of the Power Company, and to protect the true interests of the Power Company itself, an accounting should be had between the Power Company, and Kissel, Kinicutt and Company, the Power Company and the Railway Company, and the Power Company and William and Sinclair Mainland, under the auspices and by the authority of the Court, and that this may be accomplished it is necessary that a Receiver of the Power Company be appointed to assert the rights of the Power Company against the persons and corporations named; that, as a matter of course, no one outside of the Railway Company can be found to bid at any sale of the Power Company's property, unless such bidder can have full information as to the location, character and quantity of such property, and an opportunity to fully inspect the same; that any such bidder must also have full information as

to the operating history and results of the property; that the property itself and all information regarding it is in the hands of the Railway Company, and that all avenues of information are closed; that even the representatives of the interveners who would wish to bid if any such sale were had, if necessary to protect their interests, have been refused the necessary information, and William Mainland, the President of both the Power Company and the Railroad Company, has refused to give the representatives of the interveners a letter of introduction to the local manager of the Power Company, authorizing him to show such representatives over the property, though requested thereto.

The Bill in Intervention (as amended) prays for the appointment of a Receiver, that the 718 bonds be declared illegal and void; and that the defendants be required to show in detail what disposition has been made of the 107 bonds.

The answer of the Railway Company:

1. Denied that the allegations of the bill entitled the interveners to any relief against the Railway Company and moved that the same be dismissed as to the Railway Company .

2. Denies that the consolidated bonds had no market value or were worthless, denies that the exchange was without consideration, and denies that such exchange was either as to the defendant, the Power Company, or the interveners, wrongful or fraudulent.

3. Says that the Power Company was on September 25, 1912, in need of \$250,000.00 and that it applied to the Railway Company for a loan of that amount, that the Railway Company was the owner by purchase of the consolidated bonds of the par value of about \$1,500,000.00, bearing interest at 6%; that the Power Company represented that it had in its treasury as free assets first mortgage bonds to the amount of \$305,000 and was entitled under the terms of the trust deed to further issue first mortgage bonds in excess of \$500,000.00; that the Railway Company agreed to make the loan of \$250,000.00 if the Power Company would exchange \$500,000.00 of its first for an equal amount of seconds held by the Railway Company, and at the same time pledge first mortgage bonds as collateral to an amount double that of the loan; that the Power Company thereupon procured the certification of the bonds to which it was entitled from the trustee and made exchange under the said agreement to the amount of \$440,000.00, and that the first mortgage bonds being thus delivered to the Railway Company, second mortgage bonds were substituted as collateral for the loan.

4. Recites the settlement with Bates and Rogers Construction Company and the alleged agreement by the Power Company in consideration thereof to make a further exchange of \$500,000.00 of first mortgage bonds for seconds.

5. That it loaned the \$250,000.00 as provided and made the exchange of bonds as stated, and that it

claimed to own and did own the said \$718,000.00 par value of first mortgage bonds and was entitled to participate in the distribution of the proceeds of any sale to the extent thereof.

6. Prayed that its ownership of the said bonds be confirmed and that the Bill in Intervention be dismissed as to it.

The answer of the Power Company is in greater detail but covers the same essential facts.

The claimant, the State Bank, answered with reference to the 107 bonds that being applied to for the certification of the said bonds, it employed H. M. Byllesby and Company of Chicago, Engineers, to examine and advise it respecting the existence of additions to the property and the propriety of the expenditures upon which the proposed issue of bonds was based and that it received the report of said engineers about the 10th of March, 1913, and that the same was considered until March 31st, on which date it was advised by its counsel that the Power Company seemed to be entitled to have certified and delivered to it the 107 bonds, and the same were certified accordingly, and delivered to the Power Company.

The theory of the appellees at the time of filing their bill of intervention, as clearly appears from the bill, was that at least as early as the 25th of September, 1912, the syndicate which owned and held all the Railway securities of every class and which through the Railway as a holding company, owned nearly all

the second mortgage bonds and practically all the stock of the Power Company, had determined to wreck the Power Company and through their control of the situation, buy its property without competition at a foreclosure sale, giving junior securities of the Railway Company in payment thereof and thus sequester the entire property and income of the Power Company for the benefit of the owners of the Railway securities and that the contract of September 25, 1912, the contract of December 27, 1912, the exchange of all the first mortgage bonds which could be gotten in to the treasury of the Power Company before the default and the pledge as collateral of the 107 bonds which could not be obtained until after the default, the creation, in advance of the anticipated default, of an alleged bondholders committee composed chiefly of the holders of the Railway securities who did not hold any of the bonds to be "protected", the plan of re-organization, and the foreclosure were all a part of the scheme; and much of the evidence taken by the interveners was intended to establish the existence of such a purpose and to show that in making the exchange of bonds the persons who were directors of both the Railway and the Power Companies were not acting in good faith and according to their best judgment as directors of the Power Company in conserving its interests but were considering the interests of the Railway Company only and seeking to obtain an advantage for it as a creditor.

The good faith of the transaction of September 25, 1912, wherein the Railway Company, which had

assumed all the rights and obligations of Kissel, Kinicutt and Company under the contract of September 19, 1911, was released from its obligations to complete its purchase of second mortgage bonds, loaned \$250,000.00 and was to receive \$500,000.00 of first mortgage bonds in exchange for seconds, is to be judged in the light of the circumstances and therefore inquiry was made in the depositions of all the directors except Mr. Ryan who was not called, as to whether there was any definite and reasonably comprehensive plan with respect to the affairs of the company which could be carried out with \$250,000.00 and which could not be carried out with \$140,000.00 and which would provide for the solvency and stability of the company for at least some reasonable future time. No evidence of any such plan is found in any of the testimony. On the other hand there is an entire absence of any adequate reason for such radical and extraordinary proceedings, nor was there any advance notice given to the directors that any such action, constituting an entire departure from ordinary business procedure, was contemplated. The President of the company had not heard that any such action was contemplated until it was proposed in the meeting, yet the counsel for the company had the contracts and notes all drawn in advance and the minutes of the meeting completely written out (Trans. 291). Eight out of the 11 members of the Board were present. Three of these represented the western, or Mainland interests, and five represented the Railway interests. Of the five representing the

Railway interests all voted in favor of the proposition except Mr. Fuller who did not vote because he was a partner in the firm of Kissel, Kinnicutt and Company, contracting with the company. Of the three western members, two voted in the negative and one was presiding and did not vote. There were therefore four affirmative votes out of eight directors present and a total board of eleven.

Assuming that the company was in urgent need of another \$110,000.00 in addition to the \$140,000.00 which it had a right to demand from the Railway Company, was any other and manifestly better way open to it than the method adopted by the Board? It had in its treasury, or was entitled to have certified \$825,000.00 of first mortgage bonds. William Mainland testified (Trans. 318) that in his opinion the first mortgage bonds could have been sold at a fair price to realize funds. Mr. Charles E. Ranstead testified (Trans. 323) that he was in the bond business in Chicago from 1908 to 1912, as a member of the firm of Charles M. Smith and Company, which firm purchased and sold a considerable number of bonds of the Idaho-Oregon Company during that period. He submitted a table (Trans. 324-326) showing their purchases and sales of Idaho-Oregon bonds, with the amount of the sale, the date and price, which shows that the 6% bonds were sold at wholesale to dealers as late as the 13th day of September 1912, at 94 3-4. He testified that the 5% bonds would be equally salable upon a normal price ratio.

Charles O. Reynolds testified (Trans. 332) that he was in the business of selling bonds in Chicago in the firm of W. G. Souders and Company; that during the year 1908 and in subsequent years he was a member of the firm of Beierlein and Reynolds in Chicago and had been actively engaged with that firm in the purchase and sale of Idaho-Oregon bonds. He produced a schedule (Trans 333-340) showing a large number of transactions, continuing down to October 1912. Sales during 1912 were at an average price of 97.42 and three sales were made to Kissel, Kinnicutt and Company in March and April 1912 at 97 1-2 and 98. The witness' table shows that their sales of Idaho-Oregon firsts during 1910 were at an average price of 98.83, during 1911 at an average price of 97 and during 1912 at an average price of 97.42. These were all in 6% bonds. He testified that he had one transaction with Kissel, Kinnicutt and Company in November 1912 in which they purchased 5% bonds at 80 for the joint account of themselves and Kissel, Kinnicutt and Company. Beierlein and Reynolds had a joint account with Kissel, Kinnicutt and Company for dealing in Idaho-Oregon bonds which ran from January to September, 1912, and included transactions aggregating approximately \$30,000.00.

Charles L. Parmelee testified (Trans. 343) that he was a banker and member of the firm of White and Company, at 30 Pine Street, New York City, and was engaged in the purchase and sale of bonds and other securities and had bought and sold Idaho-

Oregon firsts and refunding bonds from 1910 to the Spring of 1913. He submitted a table showing the transactions of that firm in Idaho-Oregon bonds down to December, 1912. From September to December, inclusive, the price ranged from 95 1-2 to dealers to par to private investors.

Mr. Edward J. Muller testified (Trans. 348) that he was the treasurer of The Fuchs and Lang Manufacturing Company, 119 West 40th Street, New York, had been in business in New York for thirty years. He and other members of his firm were owners of first mortgage bonds of the Power Company and had personal knowledge of all the purchases. Their last purchase was July 11, 1912 at 100 1-2, that at the time of making these purchases he made inquiry with reference to the market value of bonds and the purchases made were at what he learned to be the market value in New York.

With respect to the condition of the Idaho-Oregon, reference is again made to the table of gross and net earnings (Trans. 231) from the organization of the company down to and including the year 1912, in which this transaction was had, and the fact that the gross earnings in the current year were more than \$400,000.00 and the net earnings \$215,892.00, while the interest charges on the underlying divisional bonds and the first mortgage bonds (Trans. 379) was approximately \$181,000.00 a year and this in spite of the fact that more than \$2,000,000.00 of the \$2,494,000.00 of outstanding first mortgage bonds had been issued on account of the

Ox Bow, upon which there was no return, owing to its uncompleted condition.

As tending to establish motive on the part of the Railway Company, reference is again made to the fact that its interest bearing debt was about \$7,-500,000.00 (Trans. 209) entailing interest charges of \$375,000.00, per annum, while its ostensible net income applicable to fixed charges (Trans. 205) was \$246,000.00 of which the non-operating revenue amounting to approximately \$45,000.00, was admittedly non-collectible; further that all of these first mortgage bonds of the Railway Company were in the hands of the syndicate which controlled the Railway Company and through the Railway Company controlled the Idaho-Oregon.

The testimony of Mr. Hendee, the secretary, is that under the agreement of September 25, there was an actual exchange of \$440,000.00 of first mortgage bonds for second mortgage bonds. (Trans. 258).

With respect to the Bates and Rogers transaction of Dec. 27th, 1912, under which the additional \$278,000.00 of bonds was exchanged, it is to be observed:

First, that Bates and Rogers were willing to take Idaho-Oregon firsts, at the current market value without guaranty and so proposed to William Mainland the president of the two companies; (Trans. 314) and

Second, that Fuller refused to do this but said

they would give seconds and the Railway Company would guarantee them.

Third, that both of the Mainlands testified that they have no recollection that an agreement to exchange more bonds as a consideration under this guaranty was a part of the transactions of the meeting of December 27th, (Trans. 314, 320) and

Fourth, that the minutes were written by the attorney for the company, are found in the book unsigned, that the alleged secretary of the meeting, Sinclair Mainland, says he never saw them and did not know, until a few days before his deposition was taken that there had been such an alleged transaction, (Trans. 320).

Fifth, that manifestly the provisions for an exchange of bonds up to \$500,000.00 has no possible relation to a guaranty of \$25,000.00 of seconds at 80 for an obligation of \$20,000.00; that they do not pretend to fix a definite consideration for such guaranty but named a sufficiently large amount to be exchanged to cover whatever possible certifications might thereafter be obtained.

The five directors of the Railway, the same persons being directors of the Idaho-Oregon, who represented the interests of the Railway syndicate, being respectively Mr. Wiggin, the President of the Chase National Bank, Mr. Sabin, Vice-President of the Guaranty Trust Company, Mr. Richmond of Winslow, Lanier and Company, Mr. Fuller of Kissel, Kinnicutt and Company, and Mr. Ryan of the Amalgamated Copper Company and the Montana

Power Company, resigned on February 24, 1913, as directors of the Idaho-Oregon and clerks and bookkeepers in their banks and offices were elected in their places. (Trans. 349).

Certifications of first mortgage bonds were obtained as rapidly as possible and all the bonds so obtained were transferred to the Railway Company by the exchanges.

All of these matters were presented in evidence in part, for the purpose of showing that already on September 25, 1912, the New York, or syndicate directors of the Idaho-Oregon Company were planning the default in payment of interest on its first mortgage bonds and the proceedings on that day and all the subsequent proceedings in the affairs of the company were taken not with a view to handling the affairs of the Idaho-Oregon for the best interests of that company and the holders of its bonds and stock, but with a view to permitting the default on the first mortgage bonds, and of making such preparations therefor as would conserve the interests of the Railway Company without regard for the interests of the Idaho-Oregon Company.

Much of this evidence was rendered, in a large degree, superfluous by the frank statement of counsel for the Railway Company and the *amicus curiae* upon the argument in the trial court that the Railway Company had a right to take whatever measures were in its power, through its ownership of the Idaho-Oregon stock, to protect its investment in the Idaho-Oregon property, and that on September 25,

the railway interests were of the opinion that the Idaho-Oregon could not go on without reorganization and that the measures taken then, and on December 27th, for the exchange of bonds, were for the purpose of bettering the position of the Railway Company, in view of that anticipation.

Mr. Sinclair Mainland testified (Abst. 320) that he had a conversation with Mr. Fuller just after the meeting of September 25th, in which Fuller said "that it would put them, or the railway company, in much better shape to have those bonds in case of trouble in the Idaho-Oregon."

The appellees offered to prove upon the trial (Trans. 454) that the Idaho-Oregon property was advertised for sale on December 1, 1913; that no bid was made on that date. Error is assigned upon the exclusion of that evidence. It was stipulated (Trans. 381) that on December 23, 1913, a bill was filed by a creditor against the Idaho Railway, Light and Power Company in the District Court of the United States for the Southern District of Idaho, alleging its insolvency and that a Receiver was appointed under that bill and that the Railway Company filed an answer admitting its insolvency.

It was also stipulated that for the purposes of this case the properties of the Power Company would not bring, at foreclosure sale, the amount of the first mortgage bonds. (Trans. 381).

It was agreed in the trial court (Paragraph VIII of the Decree. Trans. 163) that so far as such fact

might be at any time material, the Decree should be regarded as having been made after the sale and upon distribution, and as upon application of the Railway Company as a bondholder to share in such distribution.

The learned District Judge in deciding the case, held:

1. That the 107 bonds certified after the default (and which are not otherwise involved in this proceeding) were properly certified by the trustee and that the objection that the trustee should not, in pursuance of its duty under the trust deed, have made such certification after the default upon the issue, was without substantial merit;

2. That from about the first of January, 1912, the Power Company was completely dominated by the Railway Company;

3. That by September, 1912, the Railway syndicate had reached the conclusion that the Power Company was insolvent; that their contract to purchase second mortgage bonds was ill-advised and that their original plan could not be profitably carried out;

4. That it is extremely doubtful whether the act of the meeting of September 25, authorizing the contract under which the Railway Company got possession of 440 bonds, was in fact or in law a corporate act;

5. That the Railway Company itself was, at that time, wholly insolvent;

6. That under the circumstances it was wholly incredible that such agreement as was undertaken to be authorized on Sept. 25th was thought by anyone to be in the interests of the Power Company; that no independent Board of Directors would have given it a moment's consideration; that although the company needed money, if it was going on with the Ox Bow development, the sum contracted for was wholly inadequate for any useful purpose and if that work was not to be resumed, there was no urgent need for such an amount; that those who participated in the transaction were unable to give any reasonable explanation of the purpose for which the \$250,000.00 was to be used and that apparently there was none.

7. That the transaction practically amounted to a sale of first mortgage bonds for an equivalent amount of seconds which it was apparent must have been wholly valueless if the firsts were worth less than their face and was a surrender without any real consideration of the obligations of the syndicate to take \$175,000.00 of the face value of the seconds at 80;

8. That the only rational explanation of the agreement was that the interests in control of the Railway Company and through it, of the Power Company, had concluded that the latter was hopelessly insolvent and a reorganization was inevitable, and resorted to this expedient for saving to themselves as much of the wreckage as possible;

9. That putting aside for the moment the rights of the interveners, this was a breach of trust on the part of the officers of the Power Company and a disregard of the rights of the holders of approximately \$166,000.00 second mortgage bonds, which were held by the general public;

10. That the members of the syndicate as directors of the Power Company were "bound to conserve the interests of the company and hold its property for the common benefit of its creditors and they were not privileged to strip it of its meager remaining resources for the purpose of recouping their private losses."

11. That with respect to the alleged transaction of December 27, 1912, under which a further exchange of bonds was made, the stock of the Railway Company given to Bates and Rogers was worthless and its obligation to buy the bonds back from Bates and Rogers (hereinbefore referred to as a guaranty) was, because of the railway's insolvency, unenforceible and practically of no value.

12. That the Power Company could have made a settlement direct with Bates and Rogers with first mortgage bonds at a comparatively small discount and that the devious course was adopted, not upon their demand or for the interests of the Power Company, or because of any necessity therefor, but for the sole purpose of furnishing a pretext for getting the first mortgage bonds out of the treasury of the Power Company and into the hands of the Railway

Company, and for the interest alone of those by whom the latter was dominated.

13. That the corporation here was insolvent and that an insolvent corporation can not rightfully give away its property and defraud its creditors, nor can it legitimately prefer the claims of its officers and stockholders;

14. That it is a mistake to assume that the interveners contracted only for a certain security and that all their rightful demands were satisfied when it was properly certified that the requisite expenditures and improvements had been made; primarily they contracted for payment, they had a right to assume that the business of the company would be conducted fairly and honestly; the stockholders, even if they had been free to act, had no incentive to exercise vigilance, and the corporation had wholly lost the protection of its natural guardians; that in such case, the creditors alone can be affected and they alone have any interest in avoiding the contract. The creditors were entitled to have their mortgage security maintained as well as created.

15. That the Railway Company is in reality the actor (Trans. 150); that it was not content with what it was thus lawfully able to acquire through its control of the Power Company; "it is dependent upon and is here invoking the assistance of a court of equity to make actually available to it the fruits of its wrong doing. Through the trustee it seeks a foreclosure of the security of the bonds and an order distributing to it a proportionate share of the

proceeds of the property. It is asking the court to aid it in enforcing contracts the possession of which it obtained in a manner violative of sound principles of public policy and of good morals, and in that view it is quite unimportant whether the interveners would have any standing as plaintiffs in an independent suit. Regardless of who objects or whether anyone objects, a court will not knowingly assist a party to reap the fruits of its wrong doing, and under the rule the Railway Company must be denied the relief which it seeks;"

16. That the Power Company is entitled only to be protected against loss and not to be enabled to reap a profit from the attempted wrong, and that in so far as may be possible, there should be a restoration of what it has received. "While the 440 bonds acquired under the agreement of September 25, are apparently not held as collateral under the first provision of the contract, but by virtue of an exchange under a later provision, and, strictly speaking, are therefore technically subject to no other equity than the obligation to return the exchanged consolidated bonds, which are already in the possession of the Railway Company as collateral, I shall regard the substance rather than the form, and accordingly the moneys actually advanced to the Power Company under the contract of September 25th, will be charged against the bonds, such advances to be first subject to a deduction of such amount, if any, as remains of the \$140,000.00 due under the original contract of September 19, 1911, after satisfying

therefrom any other claims for advances made to the Power Company properly chargeable against that obligation."

17. In a supplementary opinion (Trans. 153) the Court said that the parties having agreed that the existing record touching the transaction of September 25th, 1912, should be construed as showing that the Railway Company advanced \$250,000.00 and no more, for which it is entitled to credit under the principle of the adjustment explained in the original opinion, there would be deducted the \$140,000.00 due under the original contract and the Railway Company would be decreed an equitable lien upon the 440 first mortgage bonds for the balance of \$110,000.00 with interest, and also be decreed the right to receive the 175 second mortgage bonds contracted for;

18. That as to the Bates and Rogers transaction, no additional evidence having been offered, it was not thought that the record shows the Railway Company to have parted with anything of value on account thereof, or to have any substantial equities in the premises.

DECREE OF THE DISTRICT COURT.

It appearing to the Court that the main action herein is a suit to foreclose a certain mortgage or deed of trust, executed by the defendant Idaho-Oregon Light & Power Company to the State Bank of Chicago, as Trustee, securing an issue of bonds to the authorized amount of \$7,000,000.00, of which

3,319 of the par value of \$3,319,000.00 were alleged to be issued and outstanding, said bonds being known as First and Refunding Mortgage Bonds;

And it further appearing that A. W. Priest and others, being the owners and holders, individually, of bonds of the said issue and secured by the said mortgage to the plaintiff, and also constituting and acting as a Bondholders' Committee and as such holding and representing other bonds of the same issue to a large amount, have heretofore filed their petition in intervention in said cause;

And it further appearing that by an order entered herein on September 19, 1913, the said Bondholders' Committee was authorized and permitted to intervene for certain purposes as in said order specified, and the said defendant Idaho-Oregon Light & Power Company was required to answer the allegations of the said petition with reference to a certain 718 bonds of the said issue secured by the mortgage to the plaintiff, and also with reference to a certain other 107 bonds, and also with reference to a certain other 520 bonds;

And it further appearing that the Idaho Railway, Light & Power Company was by said order made a party to the action for the purpose of answering, and was directed to answer the allegations of the said petition or bill in intervention respecting the said 718 bonds;

And the cause now coming on to be heard upon the said petition or bill in intervention, and the an-

swers of said Idaho-Oregon Light & Power Company, Idaho Railway, Light & Power Company and State Bank of Chicago to said bill in intervention, and upon the evidence taken upon the issues thus joined, and in conformity with the opinion heretofore rendered herein on August 24th, 1914;

And it further appearing that since the filing of the said bill in intervention and the said answers thereto, one W. J. Ferris has been appointed by this Court Receiver of the said Idaho-Oregon Light and Power Company and all of its property and effects, and is now in possession or entitled to the possession thereof as such Receiver, and that in another proceeding, now pending and undetermined in this Court, one O. G. F. Markhus, has been appointed Receiver of said Idaho Railway, Light and Power Company and is now in the possession, or entitled to the possession, of all the property and effects of said Idaho Railway, Light & Power Company as such Receiver.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I.

That said W. J. Ferris and said O. G. F. Markhus are hereby made parties to this decree, as Receivers, respectively, of said Idaho-Oregon Light & Power Company and said Idaho Railway, Light & Power Company, so far as may be necessary for its enforcement.

II.

That the said 107 bonds were duly and legally certified by the Trustee, said State Bank of Chicago, and delivered to the said defendant Idaho-Oregon Light & Power Company.

It appears from the answer of the Power Company and from some of the evidence that these bonds are now held by the Railway Company, but only as collateral, and by agreement of the parties the question of the nature and extent of the right or title of the Railway Company thereto is excluded from consideration, and this judgment is without prejudice to the determination of the status, title and ownership of the said 107 bonds in another proceeding.

III.

That the alleged agreement of September 25th, 1912, which includes the proposed exchange of bonds of the issue secured by the mortgage to the plaintiff to the number of 500, having a par value of \$500,000.00, for other junior or second mortgage bonds, having a par value of \$500,000.00, entitled "Consolidated First and Refunding Mortgage Bonds," secured by mortgage to the defendants Bankers Trust Company and F. N. B. Close, and the exchange of such bonds made in pursuance thereof, are illegal and void, and that the said respondent Idaho Railway, Light & Power Company is not entitled to share in the proceeds of the mortgage sale of the property covered by the said mortgage to the plaintiff, as the owner of said bonds, exchanged in pursuance there-

of, and secured by said mortgage to the plaintiff, except as hereinafter provided.

IV.

It appearing that as a part of the said agreement of Sept. 25th, 1912, the said Idaho Railway, Light & Power Company was to loan \$250,000.00 to said Idaho-Oregon Light & Power Company, but that it was at the same time entitled to receive upon demand \$140,000.00 in payment for the second or so-called Consolidated Bonds to the par value of \$175,000.00 which right and demand was, or was attempted to be, released and discharged by and in pursuance of the same agreement; that the said \$250,000.00 when so loaned was to be secured by the deposit of first mortgage bonds secured by the mortgage to the plaintiff herein, which bonds were so deposited to the amount of \$440,000.00 but which in pursuance of the exchange agreement were withdrawn as such collateral and for the purpose of carrying out the said exchange, and that there were substituted therefor consolidated or second mortgage bonds as such collateral; and it appearing that all of these transactions, to-wit: the agreement for and the making of the said loan, the release by the Idaho-Oregon Light & Power Company of its right and demand to receive \$140,000.00 in payment for \$175,000.00 par value of consolidated bonds; the agreement for the exchange of bonds by which the Idaho-Oregon Company surrendered first mortgage bonds and received back second or consolidated bonds, and the several deposits

and exchanges of collateral in connection therewith, were all connected and interdependent and each constituting a consideration for the others;

IT IS ORDERED, ADJUDGED AND DECREED that the said Idaho-Oregon Light & Power Company, by its Receiver, W. J. Ferris, is entitled to receive back from said Idaho Railway, Light & Power Company the 440 first mortgage bonds, secured by the trust deed to the plaintiff herein, which were exchanged as part of said transaction; that the said Idaho Railway, Light and Power Company, by its Receiver O. G. F. Markhus, is entitled to receive back from the said Idaho-Oregon Light & Power Company second mortgage or consolidated bonds to the amount of \$440,000.00 which it, the said Idaho Railway, Light & Power Company, gave in said exchange; that said Idaho Railway, Light & Power Company by its Receiver is entitled to recover from said Idaho-Oregon Light and Power Company the sum of \$110,000.00, being the amount advanced or loaned by said Railway Company to said Power Company in excess of the \$140,000.00 which the said Power Company was entitled to receive, with interest at the rate of six per cent (6%) per annum thereon, from the dates when the sums constituting the said \$110,000.00 were so advanced, and that such advances and the dates thereof are as follows:

December 14, 1912.....\$40,000.00

December 16, 1912..... 40,000.00

January 4th, 1913..... 30,000.00

that the said Idaho Railway, Light and Power Com-

pany, by its Receiver, is entitled to the possession, as collateral security for the repayment of the said \$110,000.00 and interest, of the \$440,000.00 of first mortgage bonds originally deposited by said Idaho-Oregon Light & Power Company as collateral for the loan agreed to be made on September 25th, 1912. It appearing that the \$440,000.00 of first mortgage bonds are now in the possession of the said Idaho Railway, Light & Power Company, or its Receiver, IT IS ORDERED AND ADJUDGED that he retain the same, but not as the property of the said Idaho Railway, Light & Power Company but as collateral to the said indebtedness of \$110,000.00 and interest, as above set forth, and that all second mortgage or consolidated bonds held by said Idaho Railway, Light & Power Company, or its Receiver, as collateral to the indebtedness, or alleged indebtedness, growing out of the agreement of September 25, 1912, be surrendered by said Idaho Railway, Light & Power Company and its Receiver to said W. J. Ferris, Receiver of said Idaho-Oregon Light & Power Company.

V.

That upon sale of the mortgaged property under the foreclosure proceedings herein the said Idaho Railway, Light & Power Company, or its Receiver, shall be entitled to share in the proceeds thereof, as the holder of said 440 bonds as collateral to secure the said indebtedness of \$110,000.00 and interest.

VI.

It further appearing that in December, 1912, a

further agreement, or pretended agreement, was made by the said Idaho-Oregon Light & Power Company and said Idaho Railway, Light & Power Company, whereby a further exchange of first mortgage bonds secured by the mortgage to the plaintiff herein, which the said Idaho-Oregon Light & Power Company was then entitled to issue under said first mortgage, were to be exchanged for second or consolidated bonds, issued by said Idaho-Oregon Light & Power Company, up to a total par value of \$500,000.00 in consideration of an agreement made, or to be made by said Idaho Railway, Light & Power Company, whereby said Idaho Railway, Light & Power Company was to contract with the Bates & Rogers Construction Company to purchase back upon a certain demand from said Bates & Rogers Construction Company \$25,000.00 face value of the Power Company's consolidated bonds, and also to issue to the said Bates & Rogers Construction Company fifty (50) shares of the preferred and one hundred (100) shares of the common stock of the Railway Company; and it further appearing that an additional 278 first mortgage bonds, secured by the mortgage to plaintiff herein, having a par value of \$278,000.00 were so exchanged with the Railway Company for second or consolidated bonds of said Power Company, then held by said Railway Company, having a par value of \$278,000.00;

IT IS FURTHER ORDERED, ADJUDGED and DECREED, that the said agreement for such further exchange is illegal and void, and the exchange

made thereunder invalid and fraudulent, and that said Idaho Railway, Light & Power Company, or its Receiver, shall return to said Idaho-Oregon Light & Power Company or its Receiver the said 278 first mortgage bonds, having a par value of \$278,000.00, and that the said Idaho-Oregon Light & Power Company or its Receiver shall return to said Idaho Railway, Light & Power Company or its Receiver the said second or consolidated bonds to the par value of \$278,000.00, so far as they may be in its or her possession either now or in pursuance of the foregoing portion of this Order, and that so far as they may be already in the possession of the Railway Company the said Idaho-Oregon Light & Power Company and its Receiver shall relinquish all right and title thereto.

VII.

IT IS FURTHER ADJUDGED AND DECREED, that Idaho Railway, Light & Power Company is entitled to receive from Idaho-Oregon Light & Power Company second or consolidated mortgage bonds of said Idaho-Oregon Light & Power Company, secured by the deed of trust of said Bankers Trust Company and F. N. B. Close, to the par value of \$175,000.00 on account of the \$140,000.00 charged against the advances to the Idaho-Oregon Company. And it is ORDERED that upon sale and distribution under the foreclosure herein, said Idaho Railway, Light & Power Company shall be entitled to share in the distribution of the surplus for the second mortgage bondholders, if any, as the holder

of such bonds, to the par value of \$175,000.00 in addition to other second mortgage bonds which it now holds or to which it is entitled; and in the meantime said Idaho-Oregon Light & Power Company shall, upon demand from said Idaho Railway, Light & Power Company, deliver the said second or consolidated mortgage bonds to the par value of \$175,000.00.

VIII.

This decree is entered in advance of sale and distribution under the said foreclosure at the request of and for the convenience of the parties, and upon the agreement in open court, all parties hereto consenting, that this decree shall be regarded so far as such fact may be at any time material, as having been made after sale and upon distribution, and as upon an application of said Railway Company as bondholders to share in such distribution and as against objection by these intervening bondholders and that no objection shall be made to said decree by any party affected thereby at any time or place upon the ground that the same is premature or untimely.

Entered this 18th day of September, 1914.

FRANK S. DIETRICH,

District Judge.

Filed September 19, 1914.

From this decree the Receiver of the Railway Company, the Railway Company and the Idaho-Oregon Company appealed and the interveners, A. W.

Priest and others, as a bondholders committee prosecuted a cross appeal assigning the following errors (Trans. 521).

ASSIGNMENT OF ERRORS BY CROSS APPELLANTS.

I.

Because the said court erred in holding and deciding that the said Idaho Railway, Light & Power Company and O. G. F. Markhus, as its Receiver, should be recognized as having an equity in the 718 bonds mentioned in said decree corresponding to the consideration it had paid out, and of which the Idaho-Oregon Light & Power Company received benefit.

II.

Because the said court erred in holding and deciding that the said 718 bonds should not be returned or cancelled or annulled until there had been a restoration by the Idaho-Oregon Light & Power Company, or its Receiver, of what said Company had received under the contracts or by virtue of the transactions annulled or set aside by the court in its said decree, and under or by virtue of which the said Idaho Railway, Light & Power Company received the said 718 bonds.

III.

Because the said court erred in holding and deciding that the moneys actually advanced to the Idaho-Oregon Light & Power Company by the Idaho Railway, Light & Power Company under the con-

tract of September 25th, 1912, should be charged against the said bonds after deducting the \$140,000.00 due the Idaho-Oregon Light & Power Company under the contract of September 19th, 1911.

IV.

Because the said court erred in holding and deciding that the Idaho Railway, Light & Power Company and its Receiver, O. G. F. Markhus, were entitled to hold the said 718 bonds, or any of them, as security for any money paid, or claimed to have been paid or advanced, to the Idaho-Oregon Light & Power Company under any contract or agreement whatsoever.

V.

Because the said court erred in not holding and deciding that the said 718 bonds, and each and every of them, should be forthwith returned by the Idaho Railway, Light & Power Company and its said Receiver to the Idaho-Oregon Light & Power Company, or its Receiver, without requiring any sum whatsoever to be paid to said Idaho Railway Light & Power Company, or its Receiver.

VI.

Because the said court erred in holding and deciding that the said Idaho Railway, Light & Power Company and its said Receiver had any right or claim whatsoever in or to the said 718 bonds.

VII.

Because the said court erred in admitting in evidence what purports to be a copy of the Minutes

of the meeting of the Executive Committee of the Idaho-Oregon Light & Power Company, held in the Chase National Bank December 27th, 1912, the same being marked "Respondents' Exhibit B re 718 Bonds," and to the admission of which counsel for the interveners duly objected; and to the ruling of the court admitting the same, counsel duly excepted, and still except, and which exception was by the court allowed.

VIII.

Because the said court erred in denying the motion of counsel for these interveners to strike from the record said alleged minutes of the meeting of the Executive Committee of December 27th, 1912, to which ruling of the court counsel for interveners duly excepted and still except, which exception was allowed by the court.

IX.

Because the said court erred in sustaining the objection to the following offer of evidence made by counsel for these interveners: "MR. CUMMINS: Now, I wish to offer to prove that the property in question was advertised for sale on December 1st, 1913; that theretofore a proposal to bid not less than \$1,500,000 for the property, if the property were offered not later than December 15, had been made in writing; that no bid was in fact made on December 1st, 1913; that the sale was continued to March 16th, 1914, and that on that date there appeared at the time and place named for such sale, a bidder representing or claiming to represent the Railway

Company or the interests connected therewith, who offered \$1,000,000 for the property; that the Receiver of the Idaho Railway, Light & Power Company was represented there by counsel, and, as a bondholder of the Idaho-Oregon Company, urged the acceptance of the bid. I am making that offer for the purpose of threshing out the question of its admissibility." To which offer objection was made by counsel for the Idaho Railway, Light & Power Company and its Receiver, which objection was sustained by the court; to which ruling of the court counsel for these interveners duly excepted, and still except, and which exception was allowed by the court.

X.

Because the said court erred in not admitting in evidence what is known as the Circular of the New York Committee of March 26th, 1913, and the proposed Bondholders' agreement of May 1st, 1913, and the circular of the New York Committee, bearing date May 1st, 1913, relative to the plan of reorganization proposed by the New York Committee, the same being, respectively, Exhibits "A," "B," and "C" attached to the answer of the State Bank of Chicago, Trustee, to the bill in intervention of these interveners; and to the ruling of the court excluding the same, counsel for interveners duly excepted, and still except, and which exception was allowed by the court.

XI.

Because the said court erred in sustaining the

objection of counsel for the Idaho Railway, Light & Power Company and its Receiver to that portion of the deposition of Samuel L. Fuller, commencing with the question, "Q. What efforts did the New York Committee ever make after putting out the plan of May 1st, 1913, to obtain the assent of the Bondholders to that plan?" On page 131 of said deposition, and extending to and stopping just before the last question on page 133 of said deposition; (the evidence so excluded being set out at length in the supplemental statement settled and allowed by the court herein under Equity Rule 75). To the ruling of the court excluding such evidence, counsel for these interveners duly excepted, and still except, which exception was allowed by the court.

XII.

Because the said court erred in sustaining the objection of counsel for the Idaho Railway, Light & Power Company and its Receiver to that part of the deposition of Samuel L. Fuller, commencing with the question, "Q. At the invitation of yourself, as Chairman of the New York Committee, a conference was held in your office in New York in April, 1913, with reference to the assembling of these bonds in the hands of the New York Committee, was there not?" On page 126 of the deposition of said Samuel L. Fuller and extending to the last question on page 129 of said deposition, (the evidence so excluded being set out at length in the supplemental statement settled and allowed herein under Equity Rule 75.) To the ruling of the court excluding such evidence coun-

sel for these interveners duly excepted, and still except, and which exception was allowed by the court.

WHEREFORE, these interveners, hereinbefore named, pray that said decree be modified to the extent of requiring the said Idaho Railway, Light & Power Company and its Receiver, O. G. F. Markhus to forthwith deliver and turn over to the said Idaho-Oregon Light & Power Company and its Receiver the said 718 bonds, and that the said Idaho-Oregon Light & Power Company and its said Receiver be held entitled to the delivery and possession of said bonds without first making the payment required under the decree of the said District Court, and for such other relief as may be just and proper.

By inadvertence the assignments of error by the cross appellants refer to 718 bonds where they should refer to 440 bonds, the District Court having decreed an equitable lien in favor of the Railway Company against 440 bonds only and directed the surrender to the Idaho-Oregon Receiver of the other 278 bonds without lien or qualification. The cross appellants therefore respectfully express the desire that 440 be regarded as substituted for 718 wherever those figures appear in the assignments of error by cross appellants.

In the title of the cause the name Idaho-Oregon Light & Power Company appears first as appellant, which is likely to give rise to misapprehension. If

the Idaho-Oregon be regarded as properly joined as appellant, it is a purely nominal appellant, the real and sole appellant in legal interest being O. G. F. Markhus, Receiver of the Railway Company.

The questions raised by the appeal and cross appeal are so related that they will not be discussed under separate divisions of the brief or argument, but as a single connected series of questions.

QUESTIONS PRESENTED BY THE APPEAL AND CROSS APPEAL.

I.

In view of the interests and relations of the Directors participating in the meeting of September 25th, 1912, and the affirmative vote cast thereat, was the action of that meeting a valid corporate act?

II.

Was the transaction of September 25, 1912, by which the Railway Company obtained \$440,000.00 of Idaho-Oregon first mortgage bonds a legal and valid transaction in view of the circumstances and the relations of the two corporations, and will it stand against the objection of other holders of first mortgage bonds who are prejudiced thereby?

III.

If it is held that the Railway Company cannot lawfully retain the 440 bonds as owner and share in the proceeds of the sale as such owner with the other first mortgage bondholders, what effect, if

any, should the enforced surrender have upon the other two contemporaneous parts of the transaction, namely the release of the Railway Company from its obligation to pay an additional \$140,000 to the Idaho-Oregon for second mortgage bonds and the loan by the Railway Company to the Idaho Oregon of \$250,000 upon collateral?

IV.

If the whole transaction be held to be tainted with fraud against the corporation and its creditors and to constitute at the same time an unlawful preference, is the Receiver of the Idaho-Oregon to be regarded as entitled to tender 175 second mortgage bonds to the Receiver of the Railway Company and deduct the \$140,000, the purchase price thereof, from the \$250,000 leaving a balance of \$110,000 in the transaction?

V.

Do the mortgage creditors stand only in place of the corporation avoiding and rescinding the transaction and so equitably required to restore the previous status or are they standing here upon their own independent rights, objecting to sharing the proceeds of the sale with the holders of bonds obtained fraudulently and therefore not concerned with the transaction by which the bonds were obtained, to which they were not parties, but concerned only with their fraudulent character?

VI.

Was the agreement of December 27th, 1912, concerning the Bates and Rogers settlement and the

further exchange of \$500,000.00 of bonds authorized, and was it a corporate act?

VII.

If it be held that the transaction was duly authorized by the Executive Committee of the Idaho-Oregon, was it a legal and valid transaction in view of the circumstances and the relations of the two corporations, or was it fraudulent and invalid as to the corporation and its creditors?

POINTS AND AUTHORITIES.

I.

The proceedings of the meeting of the Directors of the Idaho-Oregon held September 25, 1912, which are in controversy, were not valid corporate acts.

See cases cited *infra* under point III.

II.

Directors are not permitted to create any relation between themselves and their corporation or its property which will make their personal interests antagonistic to that of the corporation.

10 Cyc. 790.

Cook v. Sherman, 20 Fed. 167, (Cir. Ct.,
Dist. of Iowa, 1882, Justice McCreary).

III.

A director cannot with propriety vote in the board of directors upon a matter affecting his own private interest; any resolution passed at a meeting of the directors at which a director having a personal interest in the matter voted will be voidable at the in-

stance of the corporation or its shareholders without regard to its fairness providing the vote of such director was necessary to the result.

10 Cyc. 790.

Graves v. Mono Lake Hydraulic Mining Co., 81 Cal. 303; 22 Pac. 665, (Sup. Ct. of Cal. 1889).

Paxton v. Heron (Colo. 1907), 92 Pac. 15.

Steele v. Goldfisher Mining Co. (Colo. 1908), 95 Pac. 349.

Gold Glen Mining Co. v. Stimson, (Colo. 1908), 98 Pac. 727.

Godley v. Crandall, 139 N. Y. Supp. 236.

Burns v. Mining Co., 23 Colo. App. 545; 136 Pac. 1037.

2 Cook on Stock and Stockholders, Sec. 653.

Morgan v. King, 27 Colo. 539; 63 Pac. 416.

Mosher v. Sinnott, 20 Colo. App. 454; 79 Pac. 742.

Sims v. Petaluma Gas Co., 131 Cal. 653; 63 Pac. 1011.

Woodruff v. Howe, 26 Pac. 111, (Cal. 1891).

Cooms v. Barker, 79 Pac. 1, (Mont. 1905).

Smith v. Los Angeles I. & L. Co-op. Assn., (Cal. 1889), 20 Pac. 667.

Chamberlin v. Pacific Woolgrowers Co., 54 Cal. 103.

10 Cyc. 811.

Coleman v. Second Ave. R. R. Co., 38 N. Y. 201.

Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362.

IV.

Contracts made by directors who at the same time represent an opposing interest, generally where the other contracting party is a corporation in which they are also directors, are not void *ab initio* but are voidable in a proper proceeding taken for that purpose by the corporation, its shareholders, *or its creditors*.

10 Cyc. 791.

Charter Gas Engine Co. v. Charter, 47 Ill. App. 36.

Michigan Slate Co. v. Iron Range Co., 101 Mich. 14; 59 N. W. 646.

There are authorities which go to the length of holding that a contract in which some of the directors are interested on both sides is void in such a sense that it will not be enforced in a court of justice. But the weight of authority probably is that such contracts are merely presumptively invalid and that the burden of showing that they are entirely fair is upon those claiming under them and that they will be subject by courts of equity to the severest scrutiny and set aside unless all appearance of bad faith is removed by the evidence.

10 Cyc. 808.

Gardner v. Butler, 30 N. J. Eq. 702.

Skinner v. Smith, 134 N. Y. 240, 31 N. E. 911.

Barr v. N. Y. etc. R. R. Co., 125 N. Y. 263; 26 N. E. 145.

Welsch v. Importers, etc. Bank, 122 N. Y. 177; 25 N. E. 269.

Munson v. Syracuse R. R. Co., 103 N. Y. 58; 8 N. E. 355.

McGurrkey v. Toledo R. R. Co., 146 U. S. 536, 36 L. Ed. 1079.

Wardell v. Union Pac. R. R. Co., 103 U. S. 651; 26 L. Ed. 509.

10 Cyc. 808-9.

Wilbur v. Lynde, 49 Cal. 290.

Andrews v. Pratt, 44 Cal. 309.

San Diego v. San Diego R. R. Co., 44 Cal. 106.

Hoffman Steam Coal Co. v. Cumberland Coal Co., 16 Md. 456.

Cumberland Coal Co. v. Sherman, 30 Barber 553.

Pickett v. Wiota School Dist., 25 Wis. 551.

V.

One view of the subject is that where all or the majority of the directors of either of two corporations contracting together are directors in the other, the contract made between the two corporations will be invalid on the theory of a want of contracting parties so that it may be avoided by either corporation at the instance of a shareholder of either or by a creditor under proper circumstances without regard to the question whether it is detrimental to either and no matter how open and seemingly fair it may be.

Another view is that a contract between two corporations affected by the votes of directors who are common to both is presumptively invalid and can

only be sustained by an affirmative showing of fairness and good faith.

The better reasoning seems to be that where all or a majority of the directors of two corporations are the same, a contract between them may be avoided by either corporation at its election without regard to the good faith of the transaction and without showing injury; but where avoidance is sought by any other than the corporation itself, as by a stockholder or a creditor, the contract while presumptively invalid, may be sustained upon proof of good faith and of benefit to the corporation itself, the burden of establishing good faith and beneficial character being upon those seeking to sustain the contract. The ground for this distinction lies in the fact that while the corporation itself may elect absolutely to avoid the contract, the same parties having undertaken to represent adverse interests, and being its own exclusive judge of whether it is benefited, if any other interests under the corporation but less than the corporation itself seek to avoid, the contract may, nevertheless, be sustained if good faith and benefit to the corporation be affirmatively shown.

10 Cyc. 818-9.

German Natl. Bank v. Hastings First Natl. Bank, 55 Neb. 86, 75 N. W. 531.

Fitzgerald v. Fitzgerald Const. Co., 44 Neb. 463, 62 N. W. 899.

Bear River Valley Orchard Co. v. Miller, 15 Utah 506, 50 Pac. 611.

Hutchinson v. Sutton Mining Co., 59 Fed. 998.

Martin v. Santa Cruz Water Storage Co.,
(Ariz. 1894), 36 Pac. 36.

Bill v. Western Union Telegraph Co., 16
Fed. 14 (Cir. Ct. So. Dist. N. Y. 1883).

Goodin v. Canal Co., 18 O. St. 169, 98
Am. D. 95.

Sweeney v. Refining Co., 30 W. Va. 443,
4 S. E. 431.

R. R. Co. v. Woods, 88 Ala. 630, 7 So. 108.

Geddes v. Anaconda Copper Min. Co.,
(Dist. Ct. Mont. 1912, opinion by Jus-
tice Hunt), 197 Fed. 860.

R. R. Co. v. Minis, 120 Md. 461, 87 Atl.
1062.

Church v. Church, 45 Barb. 356.

Bank v. Bank, 105 S. W. 338.

Booth v. Robinson, 55 Md. 419.

Davis v. Power Co., 77 Md. 35, 25 Atl. 982.

Pierson v. Railway Corporation, 62 N. H.
537.

VI.

The rule that contracts between corporations hav-
ing a common directorate may be avoided may be
invoked by a creditor as well as by the corporations
and their stockholders.

10 Cyc. 791.

Washburn v. Greene, 133 U. S. 30; 33 L.
Ed. 516.

Sweeney v. Grape Sugar Company, (W.
Va.) 4 S. E. 431.

VII.

Directors cannot prefer themselves as creditors

to the injury of the other creditors of the corporation.

Lippincott v. Shaw Carriage Co., 25 Fed. 577, (Cir. Ct. of Ind. 1885, opinion by Justice Woods, p. 585.)

Howe, Brown & Co., v. Sandford Fork & Tool Co., 44 Fed. 231; (Cir. Ct. of Ind. 1890, opinion by Justice Woods.)

Jackson v. Ludeling, 88 U. S. 616, 22 L. Ed. 492.

10 Cyc. 803.

Kittell v. Augusta R. Co., 65 Fed. 859.

Gottlieb v. Miller, 154 Ill. 44; 39 N. E. 992.

Reynolds v. Smith, 60 Neb. 197, 82 N. W. 627.

Kittell v. Augusta R. Co., 78 Fed. 855, (Cir. Ct. Southern Dist. N. Y. 1897.)

VIII.

This is not a case of avoidance or rescission by the corporation or by a party acting by subrogation to the rights of the corporation. The mortgage creditors should be viewed as acting in their own right by objection upon distribution to sharing the deficient proceeds of the sale with bonds obtained by fraud and so not valid and outstanding obligations under the mortgage, and constituting also an unlawful preference.

ARGUMENT.

I.

The proceedings of the meeting of the Directors of the Idaho-Oregon held September 25, 1912, which are in controversy, were not valid corporate acts.

Every one of the Directors of the Idaho-Oregon was also a Director of the Railway Company. We have then here the legal proposition that contracts between the two corporations authorized and depending upon the acts of the Directors are presumptively invalid though perhaps susceptible of ratification by the stockholders. This proposition will be discussed under another head.

In addition to this identity of the Directors is the fact that Richmond, Wiggin, Sabin, and Fuller were members of the Railway Syndicate which owned *all* the securities of the Railway Company and who were therefore directly and personally interested in a way separate and distinct from their trusteeships as directors of the Railway Company.

In the third place not only was Fuller directly disqualified from acting because he was a member of the partnership of Kissel, Kinnicutt and Company, a party to the contract, which disqualification he recognized by refraining from voting, but William and Sinclair Mainland were equally disqualified for exactly the same reason. They were parties to the original syndicate agreement of September 19, 1911, and they were parties to the new agreement of September 25, 1911, which, by one of its provisions, modified the old syndicate agreement. Un-

der this narrowest one of the rules applying to the situation therefore, three directors out of the eight present were clearly disqualified by being directly parties to the contract which was adopted. This left five or less than a quorum of the full board. Of these five, one, Thompson, voted in the negative so that this vital and radical step, which changed and was intended to change the whole future of the corporation and lead it directly toward the brink of the grave prepared for it, was adopted by the affirmative vote of four directors out of a total board of eleven, and these four were directors of the co-contracting corporation, whose assets would be directly enhanced by adding approximately one-fourth of the entire assets of the Idaho-Oregon, by this little coup.

While the learned District Judge does not rest his final conclusions upon any technical considerations of the legal sufficiency of these attempted acts of the board, he remarks that (Trans. 138) "it is extremely doubtful whether what was done at the meeting could in fact or in law be deemed a corporate act." A detailed examination of some of the authorities bearing upon this proposition will be found under III.

II.

Directors are not permitted to create any relation between themselves and their corporation or its property which will make their personal interests antagonistic to that of the corporation.

Cook v. Sherman, 20 Fed. 167.

There is an extended note to this case by J. C. Harper, Esq., of the Cincinnati Bar, which discusses the relation of confidence existing between the director and the stockholders of a corporation, the matter of an adverse interest necessary to render a contract invalid, when an officer may acquire an interest adverse to the corporation, and the confidential relations of directors to the creditors of the corporation. The general proposition is doubtless unimpeachable, but it is not construed to render impossible transactions between a director and his corporation and its application to the case at bar would be more profitably considered under subsequent heads.

III.

A director cannot with propriety vote in the board of directors upon a matter affecting his own private interest; any resolution passed at a meeting of the directors at which a director having a personal interest in the matter voted upon, will be voidable at the instance of the corporation or its shareholders without regard to its fairness providing the vote of such director was necessary to the result.

In *Graves v. Mono Lake Hydraulic Company*, 81 Cal. 302, 22 Pac. 665, the directors of a mining company held a meeting at which four were present, including the President, Secretary and Superintendent. Salaries to all three were voted and notes given secured by mortgage to secure the indebtedness thus created. The case was an action to foreclose the mortgage.

It was held that the resolutions were not legally adopted and were voidable at the election of the corporation or at the election of a minority of the stockholders in case the corporation had refused to avoid them, without regard to whether they were fair and honest or not; citing *Andrews v. Pratt*, 44 Calif. 309; *San Diego v. Railroad Company*, 44 Calif. 106; *Wilbur v. Lynde*, 49 Calif. 290; *Chamberlain v. Wool Growing Co.*, 54 Calif. 103; *Tracy v. Colby*, 55 Calif. 67; *Wardell v. Railroad Co.* 103 U. S. 651; *Koehler v. Iron Co.*, 2 Black 715, and 1 *Morawetz, Private Corp'ns.*, Sec. 516-520.

A note on this case says a contract between a corporation and individuals some of whom are directors of the corporation is voidable at the option of the corporation, citing cases. * * * And on a sale of corporate property to one of the directors taking part in the transaction as buyer and seller, it devolves upon the directors to establish the good faith of the transaction and that the sale produced the full value of the property, citing *Wilkinson v. Bauerle*, (N. J.), 7 Atl. Rep. 514.

In *Paxton v. Heron*, (Colo. 1907), 92 Pac. 15;

Three of five directors of a corporation voted one of the three a salary as secretary. Held invalid, the vote of the person interested being necessary to the action.

In *Steele v. Goldfisher Mining Co.*, (Colo. 1908), 95 Pac. 349, two of three directors had their salaries as officers fixed by one resolution covering both salaries. Held invalid.

In *Gold Glen Mining Co. v. Stimson*, (Colo. 1908), 98 Pac. 727, the officers of the corporation advanced money for the development of the company's mines under an agreement whereby the money was to be repaid only out of the net proceeds of the sale of the ore. A resolution adopted by three of its directors, two of whom had advanced money to it, authorizing the execution of the company's notes, was held invalid. "Besides, two of the directors who voted for this resolution were not competent to act. They made advances and by the resolution were also to receive notes. Their self interest in securing the acknowledgment and payment of these debts and their duty to the company conflict. The resolution depending as it does on their votes is void and does not bind the company."

In *Burns v. Mining Co.*, 23 Colo. App. 545; 136 Pac. 1037, the corporation borrowed money of one of its directors and a note was given. In a suit upon the note it was held that the note was invalid because the vote of the payee was necessary to the authorization of the note. If the presence and vote of the director loaning the money is necessary to constitute a quorum and to make a majority upon such vote, the act is voidable at the instance of the corporation or its stockholders. The trust relations existing between the directors and stockholders of a corporation ought not to permit such an act and a court of equity will scrutinize all contracts made in this way and set them aside regardless of the good faith of the transaction.

In *Smith v. Los Angeles O. & L. Co-op. Assn.* 20 Pac. 667, a director of a corporation was held disqualified to vote at a meeting of the Board of Directors upon a resolution authorizing the renewal of notes in his own favor.

Where the directors, who assume to make a contract between a corporation and themselves as individuals, constitute a majority of the board, the contract will not be binding upon the corporation. The principle is that a disinterested majority of the directors is necessary to a contract with a corporation through the action of the board and that a contract is invalid if the vote of an interested member of the board is necessary to make it, whether the directors acted in good faith or not.

10 Cyc. 811.

Coleman vs. 2nd Ave. R. R. Co., 38 N. Y. 201.

Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362.

IV.

Contracts made by directors who at the same time represent an opposing interest, generally where the other contracting party is a corporation in which they are also directors, are not void ab initio but are voidable in a proper proceeding taken for that purpose by the corporation, its shareholders, OR ITS CREDITORS.

In the case of *McGurrkey vs. Toledo R. R. Co.* 146 U. S. 536, a railroad company made contracts by which it leased rolling stock from a syndicate com-

posed mostly of those interested in the organization of the road and money was raised by car trust securities issued to themselves or persons in confidential relations with them. The transaction was declared a constructive fraud upon the prior mortgagee of the railroad. An extensive note to this case discusses the dealings of the officers of the corporation with the corporation or with its property, citing a large number of cases. The note declares that a valid mortgage cannot be given by an insolvent corporation which has not suspended business to some of its stockholders, nearly all of whom are directors, to indemnify them from liability as endorsers on its paper over due and about to become due, and cites *Howe v. Sandford Fork & Tool Company*, 44 Fed. 231.

In *Wardell v. Union Pacific R. R. Co.*, 103 U. S. 651 the directors of the Union Pacific Railroad Company made a contract between themselves and the railroad company by which they should prospect for coal along the line of the railroad and the railroad company should buy coal of them and the company leased coal bearing lands to these persons. A corporation was formed to develop and work the mines, the majority of the stock of which taken by six of the directors of the railroad company, one of whom was its president. Held that the contract was a fraud upon the company. The character of the directors as agents for the company forbade the exercise of their powers for their own personal interests against the interests of the company. They were thereby

precluded from deriving any advantage from contracts made by their authority as directors except through the company for which they acted.

V.

Where all or a majority of the directors of two corporations are the same, a contract between them may be avoided by either corporation at its election without regard to the good faith of the transaction and without showing injury, but where avoidance is sought by the stockholders or a creditor, a contract while presumptively invalid may be sustained upon proof of good faith and a benefit to the corporation, the burden of establishing good faith and beneficial character being upon those seeking to sustain the contract.

In the case of *German National Bank v. Hastings First National Bank*, 55 Neb. 86, 75 N. W. 531, the president, one director and a stockholder, who was not a director, acting without authority from the board of directors sold all the visible assets of this insolvent corporation and turned the proceeds of the same over to a single creditor, a corporation in which two of the persons so acting were interested and of which they were directors.

These acts were reported to a meeting of the board of directors attended by four out of seven members, two of the four being directors of the preferred corporation also. They did not in fact act upon it. The Court says that as a board of directors they could have done nothing which would bind the corporation

because, of the four present, two were directors of the preferred corporation. Their votes, or the vote of one of them would be essential to action and a resolution so adopted would be voidable. "It is true that there is a conflict of authority as to the character of this act moved by the votes of common directors of two contracting corporations but the question discussed is not whether such contracts are valid for it is conceded they generally are not. The question is whether they are always voidable at the election of the stockholders or whether they may be sustained on an affirmative showing of fairness and good faith."

In the case of *Fitzgerald v. Fitzgerald Const. Co.*, 44 Neb. 463, 62 N. W. 899, a majority of the directors of the construction company were officers of the railroad company and included George Gould and Russell Sage, the court said: "Never was the infallible truth that a man cannot serve two masters better illustrated than by the facts of this case. Each party to the agreement was interested in securing the most advantageous terms consistent with fair dealing and with the rights of the other. Hence, Messrs. Gould and Sage could not at the same time protect the rights of both corporations. Conceding the personal integrity of the directors named as well as of Mr. Cross who acted with them, still the law has placed the seal of its disapproval upon the transaction and pronounced it fraudulent, not on account of any imputed evil purpose on their part but for motives of public policy. It was said in *Gordon v.*

Canning Co., 36 Neb. 548, 54 N. W. 830, that the relation of directors to the stockholders of a corporation is not essentially different from that ordinarily existing between trustee and cestui que trust. Courts of equity will set aside such contracts for fraud and generally on a slight showing of fraud on the part of the trustee. And the proposition that this transaction is fraudulent as against the construction company without regard to the motives of the directors named is sustained by the following, among the many cases which might be cited to the same effect: Citing *U. S. Rolling Stock Co. v. Atlantic and G. W. R. R. Co.*, 34 O. St. 450. *Kitchen v. R. R. Co.*, 69 Mo. 224. *Flagg v. R. R. Co.*, 10 Fed. 413. *Beach, Private Corp'ns*, 247."

In the *Bear River Valley Orchard Co. v. Miller*, 15 Utah 506, 50 Pac. 611, the acting parties were officers and directors of two corporations. The court, on page 614, says these officers could not act adversely to the interest of their companies for their own benefit and so cannot bind their principals by contracts with respect to subjects in which they may have opposing interests. In such a case, their own interest may interfere with their duty to their principal. Self-interest may turn out to be a stronger motive than their obligations to their principals. Under such circumstances, the law will not allow them to serve two masters, to be led into such temptation.

Bill v. Western Union Telegraph Co., 16 Fed. 14, (Cir. Ct. So. Dist. N. Y. 1883).

The Gold and Stock Telegraph Co. made a lease of its property to the Western Union Tel. Co. for 99 years. A majority of the directors of the lessor were directors of the lessee and the lessee owned nearly two-fifths of the stock of the lessor.

The lease was held invalid. The court said: "If the directors of the lessor were not competent to vote because they were at the time directors of the lessee, the lease is void. It cannot be supposed that the requisite quorum has been obtained or that the statute contemplates or is satisfied by a vote of directors who are incompetent to vote. But the theory that the directors were incompetent to vote confounds the distinction between want of power and abuse of power; between a disqualification to vote which renders the vote nugatory and the exercise of a power which has been conferred but which ought not to be exerted. A director is not incompetent to vote because a sense of propriety may demand that he should not vote upon a particular occasion nor is an agent incompetent to make a contract because the contract he had made was unfair or even fraudulent toward his principal; if the directors were incompetent to vote, the lease would be absolutely void and no action of the stockholders could validate it. If, however, the act of the directors was culpable or obnoxious to equity under the circumstances, while the corporation might repudiate their contract, it might also ratify it and would ratify it by accepting the benefits of the transaction with knowledge of the facts. * * * Although the honesty of the agent

may be unquestioned and he may have attempted to exercise scrupulous impartiality as between his own interests and those of his principal, it is the right of the latter to repudiate the transaction. Directors of corporations are its agents invested with wide powers and clothed with large discretion. They represent stockholders who are often practically voiceless in behalf of their own interest and they are held to the exercise of the utmost faith in the administration of their trust. They abuse the fiduciary relation which they sustain to the corporation and the stockholders when they enter into contracts in which their private interests may antagonize the interests committed to their care. The law does not require the corporation to take the chances that the directors have not abused their position under such circumstances.

Practically and logically, there can be no difference in the complexion of the transaction when the agent or the director instead of opposing his personal interests between his principal and himself, interposes those of a third person. * * * Applying these principles to the case in hand, the conclusion is obvious if the directors could not enter into a contract with the lessee which the lessor could not repudiate because of the peculiar relations existing between the lessee and the directors, they could not bind the lessor by a vote which was the equivalent to a contract or was indispensable to the validity of the lease."

Geddes v. Anaconda Copper Min. Co.,
(Dist. Ct. Mont. 1912, opinion by Justice
Hunt), 197 Fed. 860.

The Alice Gold and Silver Mining Co. undertook to sell its property to the Anaconda Copper Mining Co., both being controlled by John D. Ryan, one of the Railway Directors here. There were other involved interests concerning the Buhl Co-operation Company and the Amalgamated Copper Company. The complainant sought an injunction to restrain the Anaconda Copper Mining Company from transferring the stock, pending litigation as to the validity of the sale. "Upon principle, contracts between corporations having a common directorate should be regarded very much as are contracts between individual directors and their corporations. Such contracts are not prohibited nor are they *prima facie* void or fraudulent but they are voidable and it is a safe rule of conduct which imposes upon those who would sustain them the duty of showing clearly and satisfactorily that they are entirely fair and free from wrong. In the light of the complexities that have come to surround corporation transactions, whereby interlocking directorates are frequently acting for corporations dealing with each other, opposing interests are often involved.

"For example, plainly, it is to the interest of a corporation which sells its property to receive as large a consideration as possible for it. Equally clear it is that it is to the interest of a buying corporation

to buy for as small a price as it properly can, but if we have one director who is a managing director acting for the selling concern who at the same time represents the buying concern and who is a managing director for it, necessarily we have an apparent conflict of interests, a conflict that upon complaint by minority shareholders, the law must become concerned with and will inquire into with exceeding circumspection.

“The books are not harmonious in their discussion of the better view to take of a transaction such as the evidence discloses the one under examination was, but after reading the many cases cited and others referred to by text writers, we can well approve of the doctrine stated by Thompson that such contracts while not void are voidable. He says:

‘Contracts between corporations having a common directorate are regarded by the courts very much with the same suspicion as contracts between individual directors and their corporations. Some courts have gone to the extent of holding that such contracts are *prima facie* fraudulent and void but the more general as well as the more reasonable rule is that such contracts are not void but voidable, and the fairness of such contracts must be shown by clear and convincing proof and it must be made to appear that they are absolutely free from fraud. Contracts between corporations having a common directorate are voidable although there was a

quorum of each board of directors who were not directors in the other.'

2 Thompson on Corporations, Sec. 1242.

The same author also writes as follows (Sec. 1243) :

'Contracts of consolidation, lease or sale, are frequently entered into between corporations where the directors of one are largely interested in the stock of the other, or where one corporation owns a majority of the stock of the other contracting corporation; or where the stockholders of the two corporations are practically the same. Such contracts are covered by the same rule substantially as those where directors deal with themselves or with the corporation.'

"My conclusion is that the burden is cast upon the defendants to satisfy the court by evidence from those who were in the best position to know all the facts and circumstances, that the whole transaction was fair and absolutely free from oppression or wrong."

VI.

The rule that contracts between corporations having a common directorate may be avoided may be invoked by a creditor as well as by the corporations and their stockholders.

This principle has not apparently received extremely numerous applications except in cases where the act in question also constituted a preference—where naturally most of the cases would

arise. The proposition springs unavoidably, however, from the principles of justice and equity that give rise to the broad principles that condemn such contracts. If, as often happens, the one corporation holds all the stock of another and remains in control of the subsidiary corporation, no resistance can, of course, be made by such subsidiary corporation and no reason for such resistance exists. Also there is no minority stockholder to appeal for protection. In such cases, action adverse to the interests of the subsidiary corporation usually has for its motive, if there is a fraudulent motive, the fleecing of the creditors of the subsidiary corporation. To say that in such case only the corporation or a stockholder can act and that a creditor is not in such privacy as to give him a standing in a court of justice is to state an absurdity.

And manifestly there can not be, as a broad proposition, any distinction between an unsecured and a secured creditor in this respect. To be sure, an unsecured creditor is completely at the mercy of a dishonest management since he may be entirely deprived of resource for payment of his debt while the secured creditor can in all cases resort to his security but it is plain that the fraudulent acts of a dishonest management might readily deprive the secured creditor of much or all of the value of his security by means often readily available.

There can then be no doubt that the principle is correctly stated when stated broadly—namely—that when a creditor is injured by the acts of directors

which would amount to a fraud upon the corporation and the corporation or its directors do not seek to avoid because they cannot or will not, the creditor may directly invoke the aid of a court of equity in a proper manner by injunction, annulment or recovery, to protect him from the consequences of the fraud. To stop short of this is to affirm that a court of equity cannot, in an important class of cases, discharge its most important function of granting relief from fraud and that plain and undoubted wrongs of flagrant character and of large importance to individuals and to the community have no remedy.

The principle is laid down squarely in 10 Cyc. 791, that contracts between corporations having common directors "are voidable in a proper proceeding taken for that purpose by the corporation, its shareholders *or its creditors.*"

Washburn v. Greene, 133 U. S. 30.

was a case entirely parallel to the case at bar as to the relations of the parties.

It was a foreclosure suit against a railroad company to foreclose a mortgage on all its property to secure the payment of 5500 bonds of \$1,000 each. A receiver was at once appointed. The company made no defense but numerous parties, holders of bonds and others with claims of various kinds against the company, with leave of court, intervened in the case and were allowed to prove their respective claims. The controversy resolved itself into a contest for

priority among the various claimants in the distribution of the proceeds of the sale of the mortgaged property thereafter to be made.

The decision of the Supreme Court by Justice Lamar disposes of a number of claims presenting different aspects but the one in which we are particularly interested is one of several claims by Benjamin Richardson, upon 1105 of the bonds.

The board of directors had sent one of their number to Europe to negotiate a sale of bonds and while there he borrowed money for expenses from a Mr. Stevens and pledged to him 50 of the bonds as collateral. These, together with the 1105 bonds, this agent and Stevens deposited in a bank in London with agreement that they should not be delivered to anyone without the joint order of the agent and Stevens. The agent was withdrawn from Europe; the indebtedness due to Stevens was allowed to go to protest and the directors were fearful that Stevens would not only sell the bonds pledged but also the 1105 and thus render nearly valueless the securities held by the directors. To prevent this, Richardson, who was one of the directors, advanced the money, charged it to the company, and received its notes therefor. Subsequently, he obtained judgment upon these notes and attempted to levy on the 1105 bonds and sell them and become the purchaser at a nominal price. He was not only denied any right to the 1105 bonds but the master reported that because of the means employed to obtain a levy on the bonds in question and the sale thereof, Richardson

should have no allowance by way of "equitable salvage" for the money advanced by him to obtain the return of the bonds to the company and the court declared itself in full agreement with the master on this point.

It will be observed that this case is identical with the one at bar in that, against the objections of other bondholders, one in a position of advantage and authority in the company was denied the right to share the proceeds of the mortgage sale upon the basis of bonds obtained by him through a fraudulent use of his position and relations. The case was a foreclosure suit and the immediate proceeding was an intervention by bondholders and neither the corporation nor a stockholder was present invoking the aid of the court for the corporation itself against the fraud.

It is especially significant that no allowance was made to the perpetrator of the fraud for the money which he had expended in connection with the transaction.

A very valuable and instructive case is that of

Sweeney v. Grape Sugar Company, (W. Va.), 4 S. E. 431.

The directors of an insolvent corporation undertook to convey to another corporation having in part the same directors, who were present and participating in the transaction, property to secure a debt to the other corporation. The action was brought by a creditor and it was contended by the defendants that the act was voidable *only* at the instance of the

corporation or its stockholders and that a creditor had no standing to avoid the act of the directors.

On page 436 after reviewing the cases cited by the defendants in support of this contention, the court says:

“In none of them have I been able to find any principle which would deny to the creditors of an insolvent corporation the right to avoid the transfer of the corporate property made by its directors in violation of their trust and duties or for the benefit of themselves directly or indirectly in a case in which the rights of no innocent third party had intervened and there had been no unreasonable delay.”

The court then cites the language of the U. S. Supreme Court in *Thomas v. Railroad Company*, 109 U. S. 522-24, in which the Supreme Court says that such an act “is voidable at the election of *parties affected by the fraud.*” The West Virginia court then goes on to say:

“In the case of a corporation which is wholly insolvent and unable to continue its business, neither the corporation itself nor its stockholders have any beneficial interest in its property and, therefore, they cannot be affected by the fraud. In such case, the creditors alone can be affected and they alone have any interest in avoiding the contract.”

The cases holding that the directors of a corporation can not take advantage of their relations to

prefer themselves as creditors illustrate a somewhat different phase of the same general principle and a few such cases will be discussed under the next head.

VII.

Directors cannot prefer themselves as creditors to the injury of the other creditors of the corporation.

Lippincott v. Shaw Carriage Co., 25 Fed. 577, (Cir. Ct. Ind. '85; opinion by Justice Woods, p. 585).

Justice Wood says: "The real question therefore is whether or not the preference given or attempted to be given is invalid because Shaw and Robbins who were two of the four directors of the Carriage Company and acting with their associates in ordering the execution of the mortgages were liable as endorsers upon the notes secured thereby. Weight of authority seems to be in support of the affirmative of this proposition; for while it is generally conceded that a corporation, notwithstanding insolvency, continues possessed of a general power of managing its affairs and like natural persons may give preferences by way of payment or security to one creditor or class of creditors over others, yet, in close analogy to the rule which forbids the giving of preferences by individual debtors for the purpose of securing or in such a manner as to secure advantage or benefit to themselves and in manifest accord with the tendency of judicial opinion, as expressed upon consideration of kindred questions, it has been decided in a number of cases that preferences given by insolvent corporations in such a manner as would be of special

benefit to the directors or managing agents, or any of them, will be set aside. This, as it seems to me, is the salutary rule and the only rule which can be administered with uniformity and fairness."

In the case of *Howe, Brown & Company v. Sandford Fork and Tool Company*, 44 Fed. 231, Justice Woods also wrote the opinion, this case being decided five years later than the *Lippincott* case. The corporation while still a going concern, though insolvent, gave a mortgage on its property to secure its directors who were liable as endorsers for it to a limited amount. The court held that the mortgage was invalid as to general creditors although it was procured by the directors without any actual fraudulent intent. Justice Woods said:

"It seems to me enough to say that a sound public policy and a sense of common fairness forbid that the directors or managing agents of a business corporation, when disaster has befallen or threatens the enterprise, shall be permitted to convert their powers of management and their intimate, and it may be, exclusive, knowledge of the corporate affairs into means of self-protection to the harm of the other creditors. They ought not to be competitors in a contest of which they must be the judges. The necessity for this limitation upon the right to give preferences among creditors when asserted by corporations may not have been perceived in earlier times, but the growing importance and variety of modern corporate enterprises and interests I

think will compel its recognition and adoption. The fact in this case that the stockholders authorized the making of the mortgage seems to be immaterial. That action was, it is averred, procured by the directors proposed to be benefited, they themselves being stockholders; and, even if this were not averred, the case would not, I think be essentially different. Whether or not such preferences are fairly given is an impracticable inquiry, because there can be in ordinary cases no means of discovering the truth; and consequently the presumption to the contrary should in every case be conclusive. Concede that it is a question of proof, and that a preference in favor of a director will be deemed valid if fairly given, and it may as well be declared to be a part of the law of corporations that in cases of insolvency debts to directors and liabilities in which they have a special interest must be first discharged. That will be the practical effect, and the examples will multiply of individual enterprises prosecuted under the guise of corporate organization, for the purpose, not only of escaping the ordinary risks of business done in the owner's name, which may be legitimate enough, but of enabling the promoters and managers, when failure comes, to appropriate the remains of the wreck by declaring themselves favored creditors. Besides inconsistency with that equality which equity loves, such favors involve too many possibilities of dishonesty and successful

fraud to be tolerated in an enlightened system of jurisprudence."

In Jackson v. Ludeling, 88 U. S. 616, 22 L. Ed. 494;

the complainants were holders of 660 out of 761 bonds of \$1,000 each issued by a railroad company. The relief sought was that the mortgage might be declared a valid lien upon all the property described therein and that a sale averred to have been made under it in 1866 to the defendant, Ludeling, and his associates might be set aside; that the defendants be required to account and that the mortgaged property be sold for the benefit of the complainants. This sale was in a proceeding brought by the holder of other bonds of the same issue and was found to have been collusive and fraudulent. The bondholder in question had agreed with directors and officers of the railroad to put through this sale, form a new company and turn the property over to the new company. Justice Strong, in delivering the opinion of the court, said (p. 496) :

"Thus, these directors became avowedly confederates with Gordon to purchase the property and to purchase it for their own benefit; thus, they took a position in which it became their interest that the property should be sold at a low price; that there should be as little competition as possible and that no effort should be made to stay the sale or give any more notice than a formal compliance with the law required. Thus their interests were brought into direct antago-

nism with the interests of the stockholders and bondholders. It is impossible to regard this combination as anything less than a plain violation of their duty, a breach of the trust reposed in them and if not an actual, at least a constructive fraud."

This case bears a very interesting analogy to what was actually sought to be accomplished by the persons who, owning all of the bonds and substantially all of the stock of the Railway Company, which in turn owned nearly all of the stock of the Power Company, brought about a foreclosure of the bonds of the Power Company though not themselves interested therein, planned the purchase thereof by the Railway Company at a nominal figure and sought to hasten the sale and complete the consummation of the scheme at the earliest possible moment.

In *Gottlieb v. Miller*, 154 Ill. 44; 39 N. E. 992, it was held that an insolvent corporation may confess judgment in favor of bona fide creditors who are not directors or officers even though this results in the appropriation of all the corporate assets to the payment of such creditors; but such a confession in favor of a creditor whose claim is based on an assignment from some of the corporation officers is void. Cites (p. 995) *Beach v. Miller*, 130 Ill. 162; 22 N. E. 464, to the effect that the directors of an insolvent corporation cannot give away its assets or use them to exonerate themselves to the injury of the other creditors, and that if any of the directors are creditors of the corporation, they cannot secure

any advantage or preference in the payment of their claims at the expense of other creditors. Same doctrine in *Roseboom v. Whittaker*, 132 Ill. 81, 23 N. E. 339.

In *Kittell v. Augusta R. Co.*, 78 Fed. 855 (Cir. Ct. Southern Dist. N. Y. 1897), a director and creditor of a R. R. Co. caused property to be sold under execution upon a judgment against it for his debt and bought in the property for \$100,000 which was less than his debt.

Upon the suit of another creditor, he was required to prorate the \$100,000 because being a director, he could not obtain any preference over any other creditor.

VIII.

This is not a case of avoidance or rescission by the corporation or by a party acting by subrogation to the rights of the corporation. The mortgage creditors should be viewed as acting in their own right in objecting upon distribution, to sharing the deficient proceeds of the sale with bonds obtained by fraud and so not valid and outstanding obligations under the mortgage.

The cases in which creditors have been permitted to protect themselves from frauds by directors of corporations, which were also frauds upon the corporations themselves, do not hold that the creditors in such cases are conceived as acting under and by subrogation to the rights of the corporation. On the contrary the inferences fairly to be drawn, both

from the facts of the cases and the language of the courts in deciding them are that the creditors are viewed as directly asserting their own rights as such. In *Washburn v. Green*, the original suit was by trustees to foreclose their mortgage against a railroad. The company made no defense, but various holders of bonds and others with claims of various kinds intervened. There is no suggestion that the bondholders, of for that matter, the other creditors, were asserting their rights against the fraudulent acts of Richardson who was a director, stockholder, chairman of the executive committee, and Treasurer, under and in subrogation to the rights of the corporation. The obligations of Richardson as a stockholder were also involved in the case and various of the transactions were ones in which the corporation was bound but the creditors were not.

Justice Lamar says (33 Law Ed. 521) : "Undoubtedly his (Richardson's) relation as a director and officer, or as a stockholder of the company does not preclude him from entering into a contract with it or making a loan to it or taking its bonds as collateral security. A court of equity regards such transactions of a party in either of these conditions, not perhaps with distrust but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into with good faith with a view to benefiting the company as well as its creditors and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement."

The learned Justice cites with approval the lan-

guage of Mr. Justice Bradley in the case of *Graham v. La Crosse and M. R. Co.*, 102 U. S. 148, 161, "When a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds which in other circumstances are as much the absolute property of the corporation as any man's property is his." He also quotes the language of Mr. Justice Gray in the case of the *Wabash, St. Louis and Pacific Railway Company v. Ham*, 114 U. S. 587, 594: "It is also true in the case of a corporation as in that of a natural person that any conveyance of the property of the debtor without authority of law and in fraud of existing creditors, is fraud as against them." After this quotation from Justice Gray, Justice Lamar goes on: "Can the transaction between Richardson and the insolvent corporation, of which he was largely the owner and controller, especially with reference to the claim he is urging in this case, stand the test of the fairness and good faith which, as a director and stockholder, he owed to the corporation itself, its creditors, and bona fide bondholders?"

Nowhere in this case is it suggested that the intervening bondholders in seeking to prevent the payment out of the fund derived from the sale of the property, of bonds obtained by Richardson in violation of the good faith and duty that he owed as a director and controlling factor in the corporation,

were asserting only such rights as the corporation might assert. It seems plain that the bondholders were regarded as being in court strictly in their own right in the suit foreclosing their security and no doubt is intimated as to their legal status to defend by intervention against bonds obtained by means which were a fraud upon them; whether they were a fraud upon the corporation or not.

In *Sweeney v. Grape Sugar Company*, *supra*, the action was brought by a creditor to set aside a transfer of property made by one corporation to another having in part the same directors, to secure a debt to the other corporation, the granting corporation being insolvent. The principal defense was that *Sweeney* had no standing to avoid the transaction but that the act was voidable only at the instance of the corporation or its stockholders. Here the question was directly raised exactly as the *Railway Company* seeks to raise it in this case. *Sweeney* brought his independent action as a creditor to avoid the transaction which was doubtless a fraud upon the corporation as well as upon the creditors. The W. Va. court holds squarely against the contention of the defense and goes to the very heart of the question in language already quoted, saying: "In the case of a corporation which is wholly insolvent and unable to continue its business neither the corporation nor its stockholders have any beneficial interest in its property and they therefore cannot be affected by the fraud. In such case creditors alone can be affected and they alone have

any interest in avoiding the contract." In the case at bar not only has the corporation and its stockholders ceased to have any interest in asserting the rights which have been violated for the reason stated by the Virginia court, but for the further and stronger reason that the directors violating those rights are at the same time the creditors benefited by the violation and practically the sole stockholders.

In *Lippincott v. Shaw Carriage Company*, 25 Fed. 577, *supra*, a bill was filed by the general creditors to set aside alleged preferential mortgages. A strong effort was made at the trial to show that the debts secured by the mortgages were in whole, or in part, fictitious. The court says (page 585) "the fair and reasonable inference from all the facts is that the indebtedness of the Carriage Company to the Indiana banking company and its assignee, the First National Bank of Indianapolis, was contracted in good faith and consequently the notes made in evidence of it are all unimpeachable obligations." Nowhere in the case is it suggested that these creditors must act as though under and in subrogation to the rights of the corporation and could assert only such rights as the corporation might assert.

In the *Sandford Fork and Tool Company* case the plaintiffs were general creditors and the suit was brought to set aside a mortgage to secure the directors against their liability as endorsers of the corporation's paper. It was not alleged in the pleadings nor claimed in the argument that there was any actual intent to defraud. The directors in fact

went so far as to have a meeting of the stockholders of the corporation, at which the making of the mortgage was authorized. Manifestly in this case the corporation would have had no standing to avoid the mortgage. Apparently the right of a creditor to obtain directly and without any theory of subrogation, protection from acts which were a fraud upon him was not questioned.

It is asserted in the Bill in Intervention in the case at bar that the exchange of bonds and the release of the Railway Company from its contract to purchase second mortgage bonds was a fraud upon the corporation as well as upon the first mortgage bondholders and this is undoubtedly true. If these directors had been acting solely for the benefit of the corporation, as they would have done if they had not themselves held the second mortgage bonds, they would have employed the resources of the corporation to put it upon a solid foundation by completing its power plant and maintaining and extending its business. What were these resources? They had at least \$140,000.00 more due them for second mortgage bonds and there is no intimation that Kissel, Kinnicutt and Company, who were primarily liable, were not entirely responsible. In addition thereto they had the right, as counsel for the Railway Company so vigorously asserted, to issue an additional \$825,000.00 of first mortgage bonds. Counsel for the Railway Company substantially admit that these bonds were in 1912 marketable but say that it would have been a fraud upon purchasers to have sold these

bonds without disclosing the full situation of the company. But the company was amply able out of its income to pay the interest on first mortgage bonds and counsel's argument entirely disregards the fact that the proceeds of these bonds would have added to the resources of the company so that default and disaster would in all probability have been prevented. Assuming that the first mortgage bonds would have brought only 80, the \$825,000 would have brought \$660,000, to which is added the \$140,000 due upon second mortgage bonds already contracted for, or a total of \$800,000. What would an independent board of directors have done in the faithful discharge of their trust with \$800,000 of cash resources at their command? Was it not a fraud upon the company that they should have released the Bankers from their obligation to furnish the company another \$140,000 upon a long time obligation; deliberately have given away another \$660,000 obtainable upon another long time obligation and in exchange therefor borrow a paltry \$250,000 for which they give six months notes with bonds as collateral at two to one? As the learned District Judge so justly said in his opinion (Trans. 139) "that under the circumstances such an agreement was thought by anyone to be in the interests of the Power Company is wholly incredible. I cannot believe that an independent board of directors would have given to it a moment's consideration."

But whether or not the acts of these directors were a fraud upon the corporation we conceive to

be in fact immaterial. As the Supreme Court of West Virginia said after reviewing the cases cited by the defendants in support of the contention that the act complained of was voidable only by the corporation or its stockholders, "In none of them have I been able to find any principle which would deny to the creditors of an insolvent corporation the right to avoid the transfer of the corporate property made by its directors in violation of their trust or duties, or for the benefit of themselves directly or indirectly."

That these acts were a fraud upon the first mortgage bondholders seems almost too plain for controversy but since the main argument of the Railway Company is based upon the contention that it was not such a fraud, we will discuss that question further in our reply to the appellants' argument.

If the theory that the bondholders, if they act at all, must act under and strictly in subrogation to the rights of the corporation be denied, then the avoidance that is sought is manifestly not the avoidance of the corporation but the avoidance of the mortgage creditor and the duty of the interveners in seeking such avoidance is the duty which the law will impose upon them in the circumstances and not the duty which the law would impose upon the corporation.

The duty of one seeking to rescind is plain as a matter of conscience and completely settled as a matter of law. He cannot take the benefits of a transaction and rescind. But is this in any sense a

case of Rescission? Clearly it is not. Rescission is the act of a party to a contract or of someone acting under the right of a party. A third person who is neither party nor privy to a transaction but who is injuriously and wrongfully affected thereby may avoid the consequences of such transaction so far as they affect him and this is the case of creditors who are injured by acts of the directors of a corporation performed in violation of their duty.

One of the principles of rescission, however, applies equally to avoidance—that the party avoiding must restore whatever advantage he obtained by the transaction. The principle is the same, but the application thereof to the corporation on the one hand and to the creditor on the other may lead and usually will lead to an entirely different result. What the corporation got by the whole series of transactions, was, as to the one of September 25, 1912, \$110,000 in money in addition to what it already had coming to it on demand from the Railway Company; and as to the transaction of December 27th, it got a debt of \$20,000, not liquidated but guaranteed, in other words its old debt was not in the least diminished, but the creditor obtained what was supposed to be additional security. That was what the corporation got but what did the bondholders get? Is there any evidence in the record that they got anything whatever—that is that their mortgage security was in any way enhanced?

The Railway Company had an opportunity upon the intervention to allege and prove if it could, that

the \$110,000 went to increase the mortgage security, to pay interest on the first mortgage bonds, which would not otherwise have been paid, or for which funds were not otherwise available or in some way to benefit the bondholders. It did not choose to avail itself of this opportunity but rests solely upon its theory that the transaction by which the company obtained 718 first mortgage bonds were legally defensible, and that the first mortgage bondholders, however much they might be injured in fact were without legal remedy.

We respectfully urge upon the court, and this is the substance of all the errors assigned upon the cross appeal, that in spite of the comprehensive grasp of the somewhat involved questions of fact herein presented, which is evidenced by the opinion of the learned District Judge, the court failed to draw the important distinction which exists between the right which the corporation might assert and the duty imposed upon it in connection therewith and the right which the mortgage creditor asserts after the sale and when the holder of bonds fraudulently obtained presents himself and seeks to share in the proceeds of the sale and the duty imposed upon him. The duty imposed by the judgment of the District Court upon the creditor is exactly the same as the duty which the law would impose upon the corporation if it were rescinding, and we contend that the duty is not the same and in the nature of things cannot be the same upon this state of facts. We insist upon adherence to the principle involved, that

the party seeking to avoid the transactions must restore what he obtained thereby and the application of that principle to the facts. The matter is well illustrated by considering the transaction of December 27, 1912. What did the first mortgage bondholders get by that transaction? The District Court found that the corporation itself got nothing because the things that were given were valueless; but passing that and assigning to the considerations that passed their nominal value, what would the first mortgage bondholders get thereby? Bates and Rogers were general unsecured creditors. Can it be said that these first mortgage creditors in order to resist the final steps in the accomplishment of a fraud upon them must pay as a preferential claim out of the corpus of their mortgage estate the \$20,000 and buy back from Bates and Rogers the common and preferred stock of the Railway Company which they obtained as part of the transaction? It would seem that this question answers itself. There can be no real relation between the right of the first mortgage bondholders to resist a division of the proceeds of the sale with these bonds obtained in fraud of them and the payment of a junior and unsecured creditor who has been induced by the corporation or rather by its directors in pursuance of their fraud to accept something else than money in payment of his claim.

Suppose that the \$250,000 had been used immediately and in toto to pay an unsecured creditor, or suppose that it had been used to purchase and retire

that quantity of second mortgage bonds, would it not violate every sense of right to say that before the first mortgage bondholders could obtain the disallowance of the first mortgage bonds fraudulently obtained as a part of the transaction they would have to permit the return, out of the corpus of the estate, and as a preference over them, of this \$250,000? If that theory is to be successfully asserted then all that is necessary for directors, who may be themselves junior creditors of the corporation, in order to obtain the preference in payment of such junior claims out of the corpus of the estate and prior to the first mortgage bonds, is to perpetuate a fraud upon the first mortgage bondholders as a part of the transaction by which they seek to obtain such preference and the results are insured, for the first mortgage bondholders in order to avoid the effects of the fraud will have to submit to the preference.

If it be argued that the Railway Company is entitled to recover the \$110,000 not merely because the corporation obtained that much additional money in the transaction of September 25th, but because the Railway Company is entitled to have the security for which it contracted, mainly \$440,000 of first mortgage bonds, we reply that that is not the latest contract which it made with reference to the matter. When it made that agreement of September 25th, for first mortgage bonds as collateral at two for one, it evidently intended that to be only a temporary arrangement, for in the same instrument

it contracted for an exchange under which the same bonds would become its absolute property. This exchange it made, strictly of its own volition and strictly of its own volition it substituted therefor, as collateral, second mortgage bonds. That is the position in which it voluntarily placed itself, and having undertaken a fraudulent proceeding whereby it hoped to become the absolute owner of the bonds in question and thereby voluntarily deprived itself of those bonds as collateral and having substituted other collateral, why should it complain if it is left to enforce its claim against the collateral which it has itself selected?

Courts are not particularly tender to protect wrong doers from the consequences of their own wrongs. Equally well established among equitable principles with the one that requires restoration in case of rescission or avoidance is the one that equity will not protect the wrong doer against the consequences of his own wrong. Frequently the wrong doer is in fact protected by the necessity that the court shall not permit the other party to profit thereby; but where it does not appear that the other party will profit, the court will certainly not concern itself with the trouble in which the wrong doer finds himself and particularly will it not assess an innocent party in order that the wrong doer may not suffer.

We refer only to the case of *Washburn v. Green*, supra, upon this point. Richardson, the defrauding director, had paid out a large sum of money in con-

nection with the acts by which he obtained the bonds which were dis-allowed. In that connection the master said (33 Law Ed. 523) "it is a general rule that fraud or any gross misconduct upon the part of the salvors in connection with the property saved will work a forfeiture of the salvage and the evidence in this case, with reference to the means employed to obtain a levy upon the bonds in question and the sale thereof fully justifies us in the conclusion which I have reached, that no allowance should be made to Richardson by way of 'equitable salvage' for the moneys advanced by him to obtain the return of the bonds to the company." To this Justice Lamar adds "we fully agree with what is said by the master and do not deem it necessary or essential to add anything further on that point."

REPLY TO APPELLANTS' ARGUMENT.

I.

The substance of the Railway Company's theory of the case is that since the 718 bonds were properly and legally certified by the trustee, under the terms of the first mortgage, no question can thereafter be raised by the holders of other first mortgage bonds regarding the disposition made of them by the corporation. Counsel goes so far as to intimate that had the first mortgage bonds, after such certification, been embezzled by the directors, it would have been no affair of the other first mortgage bondholders so long as the company did not complain.

The fundamental error of this theory is that it assumes that the creditor of an insolvent corporation has no right with respect to prejudicial transactions by its officers and directors that the corporation itself would not have. It need scarcely be argued in this court that this assumption is wholly mistaken. The District Court found that this corporation was insolvent on September 25, 1912. It is not disputed by appellants that the corporation was insolvent. Appellants frankly admit that on September 25th, the directors realized that the company could not go on and that the steps taken on September 25th and thereafter were taken in view of this condition of insolvency and for the purpose of protecting the interests of the Railway Company as a creditor.

The principle that creditors of a corporation, secured or unsecured, can have set aside preferences created by its officers and directors in their own favor when the corporation was insolvent, without any regard to what the corporation might or might not do or have a right to do, is too well established to need discussion.

The Railway Company seems to argue however that a mortgage creditor is precluded from taking steps which will manifestly be open to other classes of creditors because he has a written contract defining what security he shall have and if the letter of that contract has been complied with, with reference to the issue of obligations under his security, preferences and frauds though they may attack and

destroy the value of his security or his ability to realize thereon can not be complained of. The argument would prove too much. Every creditor has presumably what his contract calls for. When a merchant sells goods on open account and extends credit upon the general responsibility of the corporation, he has what his contract calls for—the general obligation of the company for which its assets are liable. If one lends a corporation money and takes its note without mortgage or collateral, his contract defines his rights. If he has collateral pledged for payment of his note, he has two contracts, the note and the pledge defining his rights but the existence of these contracts does not require the creditor to be subject to fraud and preference whereby the assets that might be available to pay his debt are reduced or misappropriated.

It cannot be argued that the first mortgage bondholders are not injured by the fraudulent issue of the 718 bonds. It is stipulated that the Power Company's property will not sell for enough to pay the first mortgage indebtedness in full, therefore the participation of the 718 bonds in the distribution, by exactly the amount payable to them, reduces the amount which may be paid to the holders of valid bonds under the same issue. Counsel declares that this is *damnum absque injuria*, and this reduction in the sum available to pay the bona fide first mortgage bondholders would be without legal wrong if the bonds in question had been issued in good faith for the benefit of the corporation without preference

while it was a solvent concern. Nothing is better established in the law than that what directors may do in good faith with the assets of a solvent concern, they cannot do in bad faith with the assets of an insolvent concern and for the purpose of benefiting and preferring themselves at the expense of other creditors whether secured or unsecured.

This portion of the argument of appellants disregards the stipulation which they entered into in open court with respect to the character and status of this litigation. It was agreed and is declared in the decree (Trans. 163) that the proceeding shall be regarded as being had after sale and upon distribution and the application of the Railway to share in the proceeds of the sale as the holder of the 718 bonds. Is it not clear that this eliminated any question (if such question could otherwise exist) as to whether the corporation is complainant or as to what the corporation might or might not have a right to do? If, being so presented, the bonds were obtained by fraud, actual or constructive, or if they constitute a preference in favor of the Railway which the common directors of the corporation could not lawfully create when the corporation was insolvent, then they certainly can not be paid out of the proceeds of the sale if the result will be to prevent the bona fide first mortgage bondholders from receiving payment *pro tanto*.

That the transaction does constitute a preference need perhaps not be argued. These people held second mortgage bonds. There was about to be a de-

fault in interest and a foreclosure of the first mortgage bonds. It is agreed that the property will not bring enough to pay the first mortgage bonds in full. It follows, therefore, that the second mortgage bonds were worthless and for this creditor to take advantage of its control of the debtor to issue to itself first mortgage bonds in payment of the junior obligations which it held while the company was insolvent and bankruptcy was contemplated, is as clear and outrageous a case of preference as could possibly be found.

Since appellants insist so strongly upon the force and effect of the contract contained in the terms of the first mortgage, and that such effect precludes the bondholders from any remedy against fraud or preference working to their prejudice, it should be observed that this transaction was in clear violation of the purposes and intent of the first mortgage contract.

The trust deed sets out very specifically the purpose for which the proceeds of the first mortgage bonds may be used. 500 6% bonds were forthwith certified and sold for the corporate purposes; 550 were reserved for refunding underlying divisional bonds; 2000 were set aside for building the Ox Bow plant; the remainder (of which the 718 bonds are part) were to be used for the purpose of purchasing property and additions thereto. Nothing here is said about using them, or any of them, to refund a junior mortgage.

The second or consolidated mortgage on the other hand specifically provides for the refunding of the first mortgage and \$7,000,000 of the \$10,000,000 authorized, or so much thereof as might be required, were reserved for the purpose of such refunding. The consolidated mortgage was a long term obligation, the principal of which would not be due for many years. The first mortgage fell due earlier and began to fall due serially in 1915. That the company should, after being able to market these long term bonds secured by the second mortgage, use shorter term bonds under the first mortgage with which to refund them, certainly cannot be conceived to be within either the letter or the spirit of the first mortgage contract; this without regarding for the moment, any question of fraud or preference, and considering only the "contract" upon which appellants so strongly insist, and upon this extraordinary application of which they must in fact rely for any theory of defense.

The objection that there is nothing in the record to show the status of the interveners as creditors when the acts complained of were committed was not made in the District Court. It is entirely without substance. It was stipulated in the trial that the \$2,494,000 of bonds certified under the first mortgage were outstanding prior to September 25th, 1912, and that the total amount of first mortgage bonds in the Treasury on September 25th plus certifications subsequent thereto and prior to April 1st, was the \$718,000 in question and that the total

amount certified after April 1st, was the \$107,000. The bonds represented by the intervenors are therefore necessarily a part of the 2,494 outstanding on September 25, 1912.

Of the cases cited by counsel for the Railway Company, three contain language in the opinions appearing to hold against the right of a creditor to maintain an action based upon charges of fraud by the directors of a corporation where the immediate sufferers are ostensibly the corporation and its stockholders. These are *O'Connor Mining Company v. Coosa Furnace Company*, 98 Ala. 614; *U. S. v. Union Pacific Railroad Company*, 98 U. S., 596; 25 Law. Ed. 143; and *Van Weel v. Winston*, 115 U. S. 228; 29 Law. Ed. 384.

In the *Coosa Furnace* case, the bill was by a general creditor. There had been transactions between the *Furnace Company* and some of its own stockholders and directors and two other corporations having the same boards of directors. Members of a family named *Crawford* owned a controlling interest in all of the corporations and were on its boards and all the corporations were controlled by them and their adherents.

Upon examination, the case is seen not to hold in any way different from the principles announced hereinabove. It declares the absolute right of the corporation or its stockholders to have contracts between corporations in such a case absolutely avoided regardless of the question of advantage or detriment to either company—which goes farther as to the

stockholder than counsel for the interveners do, but the court says that a creditor has not the right absolutely to so avoid regardless of the question of advantage or disadvantage but that his right depends upon the fraudulent character of the acts. This is unquestionably sound, but the court says that the fact that the directors are common is of itself a suspicious circumstance and is the ground for the most careful inquiry. In the Coosa Furnace case, there was no direct discussion by the court as to where the burden of establishing the good faith and beneficial character of the act would rest, but in fact the defendants assumed that burden and according to the court showed fully and in great detail all the facts which, to the mind of the court, established its absolute good faith and its beneficial character. The acts particularly attacked were a mortgage and a deed of conveyance. The court found that the mortgage was given for money actually loaned and that the deed was for property which was paid for by the purchaser at its full value.

The court also found that the corporation was not insolvent.

The case of the United States v. the Union Pacific Railroad Company is not calculated to throw much light upon the question presented in the case at bar. The proceeding was under a special act of Congress, directing the bringing of the action, prescribing its character and creating special jurisdiction for the purpose. The court expressly found that no debt was then due from the Railroad to the United States

and that collateral matters raised by the suit had already been heard in two other cases, one of which was all ready for decision and the other of which was progressing, and that it did not appear that any rights of the United States as a creditor were being jeopardized.

It is, of course, true as a general proposition that creditors cannot through a court of equity substitute their judgment for the judgment of the directors of a corporation as to how the affairs of such corporation shall be managed, but the case at bar is far removed from any such situation. We have here in fact a case where all of the objections that have been raised in any of the cases where creditors have intervened are eliminated. We have the actual collapse and insolvency of the corporation following immediately upon the fraudulent acts of the directors. We have the frank admission that the directors of the parent or controlling corporation anticipated the collapse of the subsidiary and acted in view thereof and for the purpose of protecting as far as they could the interest of the controlling corporation. We have a foreclosure of a mortgage by which these interveners are secured and we have the controlling corporation seeking in such foreclosure to enforce and realize upon the advantage which by virtue of its control, it seized on the eve and in anticipation of that collapse.

Van Weel v. Winston was a case where a bondholder was in fact seeking to recover from the President of a railroad corporation, partly upon the the-

ory of a misappropriation of funds by the president and partly upon a trust fund theory which throw no light upon the case at bar and which we will not discuss. The facts, the relations of the parties, the theory of the action and the remedy sought are so entirely different from the case at bar that we cannot see that the case assists this court in determining the present case. The language of the court that the money was the money of the corporation and not of the bondholders and could be disposed of as it saw fit was doubtless entirely correct and appropriate language in dealing with the questions there presented without throwing any light on our case.

It is not disputed that the Power Company had the legal right to have the additional bonds certified under the first mortgage though no one acquainted with all the facts will believe that it was intended at the time of the execution of the second mortgage to have additional certifications under the first. Nor do we dispute the right of the directors to dispose of them in good faith while the company is solvent. What we do say is that if the company is insolvent in fact and legal insolvency is contemplated, the directors cannot use these bonds or any other assets or resources of the corporation to prefer themselves to the prejudice of other creditors; that the acts constituting a preference are a gross and palpable fraud upon the corporation and everybody interested therein merely adds another unimpeachable ground for equitable interference.

II.

We will discuss as briefly as possible the arguments of the Railway Company by which it seeks to justify the transactions of September 25th and December 27th. The District Court which had before it not only the record presented upon this appeal but the entire foreclosure record and the trial of a great many other collateral issues has (Trans. 139-140) described the character of the transaction of September 25th convincingly and conclusively. As disputing the inferences of bad faith and to show that the \$140,000 still due from the Railway Company upon second mortgage bonds was not sufficient, for the needs of the company, counsel refers to the statement of the company's manager (Trans. 426-429) to show that \$342,988 was needed for the period ending December 31, 1912, and that the cash available was \$139,808, leaving an estimated cash deficit of \$203,180. An examination of the statement, however, shows that \$212,562 of these requirements were for extensions to the system and not for meeting existing or current obligations, and certainly additional capital investment could only be justified by a going concern and not by one that was about to fail. Of the \$250,000 which was so needed, a substantial part was not advanced until after January 1st and of that which was provided prior to Jan. 1st, \$79,500 (being the interest on \$1,325,000 of bonds) was paid by the Railway Company to itself for interest which according to its own showing was not earned.

All the circumstances attending the meeting of September 25th are consistent with the conception of a fraudulent scheme on the part of the directors of the Idaho-Oregon, who were also members of the Railway syndicate. The transactions of Sept. 25th were certainly of a most extraordinary character. None of the members who were not in the Railway syndicate had any intimation in advance of what was to be done. Even the two Mainlands who were expected to execute the contract were not informed in advance that such a contract was to be presented. There were no proposals, no discussion, no exchange of views. The company's New York counsel, who was Fuller's personal attorney, had prepared the minutes in full in advance, including even the record of a unanimous vote "except the vote of Mr. Fuller which was not cast because of his interest in the contract." Not one of the western members in fact voted for the resolution. It was adopted exclusively by the vote of the directors who were members of the Railway syndicate.

What was the effect? It released the Railway Company from taking any more bonds under the contract of 1911 and it abstracted from the treasury of the Idaho-Oregon every scrap of paper then in the treasury or prospectively possible to be obtained which had any value under the circumstances or which might have been in any way marketable for the benefit of and for the purposes of the company and transferred it bodily to these directors.

That there was no good faith, but on the other

hand a contemptuous disregard for decent appearances is found in the fact that there is no attempt to measure the consideration involved in the exchange but it was for all the bonds that could be gotten hold of, however many or few they might be, up to a maximum which was placed large enough to insure a complete clean-up.

It is noteworthy also that Fuller said to Sinclair Mainland when questioned after the meeting as to the reason for the proceeding that "it would put them in much better shape to have those bonds in case of trouble in the Idaho-Oregon."

The transaction of December 27th has even less color of justification. Assuming that it was desirable to get rid of the Bates and Rogers contract, it is clear from the testimony of William Mainland that Rogers stood ready to take first mortgage bonds for the \$20,000 at their market price. Mainland stated this to Fuller, who said he wouldn't give him any first mortgage bonds but would give him seconds with the Railway guaranty. All pretense of necessity for this transaction thus disappears and the advisability of giving 25 second mortgage bonds and \$500,000 additional first mortgage bonds in order to get them guaranteed, instead of giving, say 25 of their first mortgage bonds outright in the first place, can hardly be a subject for discussion. There were indeed good reasons from the Railway point of view for wishing to get rid of Bates and Rogers. They intended to take over the Idaho-Oregon property at a foreclosure sale and they had their own

plans about future power developments and they wished to have no conflicts growing out of Bates and Rogers being on the ground with perhaps a large claim and the right to a mechanic's lien. But the plan that was adopted for paying \$20,000 of the settlement price, was clearly a mere device to give some color of consideration for another exchange of bonds; they having doubtless in the meantime discovered that they could obtain certifications for more than the first \$500,000.

The later steps in the plans of the Railway group must however be considered in order to throw into the full light the character of the proceedings of September 25 and December 27, 1912.

Although they authorized the first exchange on September 25 none were made until January and in the meantime they paid themselves the interest on the 718 second mortgage bonds. In January and early February they made the exchange. On February 24 the entire Railway syndicate group scuttled off the directorate of the Idaho-Oregon (Trans. 349). Even this proceeding was probably invalid since each resignation left the board without a quorum to transact business and therefore without the ability to elect a successor.

In March Mr. Fuller formed his "protective committee" and under date of March 26th sent out the plan of re-organization and a circular letter which explained to the bondholders of the Idaho-Oregon how helpless they were and invited these small scattered bondholders to deposit their bonds with this

protective committee containing some of the best known names in Wall Street. The deposit agreement and the circular letter carefully refrained from stating that the persons constituting the "protective committee" were for the most part members of the Railway Syndicate and so in fact the prospective buyers. This act of obtaining possession and control of the bonds to be foreclosed, by the very persons who at the same time owned and controlled the corporation which was to purchase without disclosing that fact, was utterly fraudulent, and, practiced as it was by great financiers upon 500 small scattered and helpless bondholders, was as contemptible as it was dishonest.

The bondholders did not come along fast enough and so the "protective committee" sent for the brokers who had sold the bonds; kept them in New York for ten days at the expense of the committee, and finally "convinced" a part of them by paying them commissions for "advice" to their customers.

Having obtained possession of the requisite two-thirds of the bonds (counting the 718 bonds as theirs) they caused the trustee to bring foreclosure as soon as the 60 days of grace had expired, although the preamble of their deposit agreement recited that the agreement was for the purpose of avoiding foreclosure. They took their evidence before the return day of the summons and on the return day presented a decree ready for delivery and sought an early sale.

Now what would the result have been of a sale at that time? Observe the interview of the Idaho coun-

sel of the company in a Boise paper given out upon the filing of the bill to foreclose. (Trans. 51). The public and the court were to be given to understand that it was a "friendly suit" instituted in order to affect a re-organization made necessary by the expansion of the property, the plans including a consolidation with the Railway Company. The property would have been purchased at the sale for a nominal sum and the Idaho-Oregon first mortgage bondholders would have had their election to take the Railway second mortgage bonds or practically nothing. Reducing the Idaho-Oregon first mortgage bondholders to a junior position in the consolidation meant simply transferring bodily the entire income of the Idaho-Oregon property to the holders of the Railway bonds, to-wit: the syndicate. If there were any fragment left at any providential future time, the tricked and defrauded Idaho-Oregon bondholders might have it.

The scheme was conceived in its entirety prior to September 25, 1912. It not only reeks with fraud but it is essentially sinister and corrupt and if it had been or shall be successful both deceit and oppression will have been its instruments.

III.

The argument of appellants under this head seems a strange abandonment of the theory of literal application of the mortgage contract upon which the previous portion of the argument is based. When considering the right of the first mortgage bondholders to prevent a fraudulent preference and the dilution

of their security by the unlawful acts of the directors, the first mortgage bondholders are held, as it were, to be estopped from urging any equitable considerations but to be held and confined by the strict letter of their mortgage contract which it was earnestly asserted had been complied with. They are not to be permitted to inquire whether the acts complained of were fraudulent or not. Admitting they were fraudulent and admitting that the bondholders will suffer the loss of part of their money thereby, they are nevertheless to have no relief because, it is said, it is not in their contract.

But when the woeful plight of the second mortgage bondholders who, with their eyes open, bought a second mortgage bond (and received \$4,000,000 of stock as a bonus and control of the company thereby) is considered, they are held to have an equitable right to subrogation under the first mortgage because the proceeds of their bonds have added to the mortgaged property and the second mortgage bonds no longer look good to them. The facts are of course that there should have been no more bonds issued under the first mortgage and it was the act of these same people who are complaining that any were certified, and they caused them to be certified only for purposes of fraud. If they had left the situation alone the first mortgage bondholders would have had their security and the second mortgage bondholders would have their junior security upon whatever equity there existed, whether created by money derived from the second mortgage bonds or

otherwise. That is exactly what each party had contracted for and what each party was entitled to have. The theory that one can contract for a second mortgage security and thereafter upon the foreclosure of the first mortgage plead to be "subrogated" under the first mortgage and share the security therewith, borders on the fantastic.

IV.

Assuming that the exchange of bonds was invalid, the Railway Company argues that the Railway Company should have restored to it the \$250,000 and interest and whatever the Power Company got in connection with the Bates and Rogers transaction; what that is, or how it is to be measured, counsel does not seem to be able to define, but seem to be satisfied with an additional \$20,000.

It is unnecessary to discuss the principle of rescission and the obligations which it imposes. It is necessary only to consider whether this is a case of rescission, i. e., whether it is the corporation acting or someone acting in the right of the corporation, and what the party seeking to avoid got and therefore what he ought to restore. The questions then are:

1. Can the bondholders act in the premises only under and by subrogation to the rights of the corporation and is the corporation rescinding through the act and agency of the bondholders; or are the bondholders, standing in the office of the special master to receive distribution, objecting strictly in

their own right to sharing the proceeds of the sale with the bonds fraudulently obtained, such fraud constituting also a preference?

2. If the corporation is rescinding what did the corporation get and what is it bound to restore?

3. If it is not a case of rescission by the corporation but a case of the bondholders asserting in their own right an objection to sharing the proceeds of the sale with fraudulent bonds, what did they get and what are they bound to restore?

We have already made clear our views upon the first question and cannot perhaps enlarge upon them to advantage. The main suit is a suit to foreclose these bonds. The bondholders are necessarily parties, either by representation or in their own persons. They are in their own right and not in any possible sense through the corporation or its rights, to which they are adverse. The controversy respects their bonds and other bonds which seek to share with them. The court has by its decree defined the position and status of the parties, to which definition all parties assented, namely that the Railway Company is the actor, presenting certain bonds which it obtained by the methods disclosed and seeking to share in the proceeds of the sale. For the purpose of the present discussion it is conceded that the bonds were obtained by fraudulent means and are invalid and not outstanding obligations under the mortgage; that if enforced they would also constitute an unlawful preference in favor of the corporation which got them, is also perfectly clear, and, it will be observed,

has not been disputed by appellants in their brief. The bondholders, although for the most weighty reasons raising this question before the sale, are, by stipulation, regarded as interposing a defense to the claim that the fraudulent bonds shall share in the deficient proceeds of the sale. How they can, at that time and place, asserting that right, be regarded as doing so and entitled to do so only under and in subrogation to such rights as the corporation might have in the premises, present counsel are unable to perceive. That creditors of any class whatever may avoid unlawful preferences affecting them, and may resist in their own right and for their own protection, frauds of corporations and directors which injure them, is established by any number of adjudications, seems rarely to have been questioned and is clear in principle.

With reference to the second question, the appellants contend that the corporation got \$250,000 through the transaction of September 25, 1912, which these bondholders should be bound to restore. The District Court found expressly (Trans. 159) that all the transactions which were adopted or directed by the meeting of September 25, were connected and interdependent, each constituting a consideration for the other. This is completely evident from the record itself, of that meeting, which was carefully prepared in advance by the company's attorney. The agreement (Exhibit "A," Trans. 112) recites the obligation of the Bankers to take the other \$175,000 of second mortgage bonds and their will-

ingness to do so, but offer "in consideration of the Bankers being released from their obligation to purchase said \$175,000 par value of said bonds, to procure for the Oregon Company upon the terms thereafter expressed the said sum of \$250,000." The terms thereafter expressed were that the Idaho-Oregon Company should give its notes for the \$250,000 due in six months with collateral at two to one and should exchange \$500,000 of bonds. The three elements are therefore indissolubly connected; the release of the Bankers, the loaning of the \$250,000, and the exchange of \$500,000 of bonds. Clearly if the transaction is to be rescinded it must be rescinded as a whole and since the contract says that the Bankers "are ready and willing to purchase at the said contract price said \$175,000 first value of said bonds" and the right of immediate demand by the Idaho-Oregon for the \$140,000 thus to be realized is fully recognized, certainly that immediate demand is automatically off-set against the \$250,000, and therefore it is plain that what the Idaho-Oregon Company got by that transaction, which it did not have or would not have otherwise, was \$110,000.00.

So if it is a question of what the corporation ought to do and if the bondholders are bound to do what the corporation would be bound to do, then the bondholders must restore \$110,000.

Strictly speaking, that is not quite the status since the Railway Company would be entitled to recover the \$110,000 only according to the methods prescribed in that same transaction. By the con-

tract they were to have as collateral not a lump sum of \$500,000 but they were to advance immediately \$100,000 and the balance thereof as requested within six months, "to be secured by an amount of the Oregon Company's first and refunding mortgage gold bonds bearing interest at the rate of five per cent per annum, equal at their face value to twice the amount of such loan."

If then, by means of this transaction, the Railway Company parted with only \$110,000 more than it was already bound to part with, the terms of their contract would be complied with by allowing them to retain \$220,000 of first mortgage bonds as collateral to the \$110,000.

Hendee, the Secretary-Treasurer, who seems to have been the one to physically handle all the paper in the transaction, testifies that \$440,000 was actually deposited as such collateral and that is the amount which the District Court allows the Railway Company to retain as security. The question has become academic since either the \$440,000 or \$220,000 will be sufficient security. The view of the District Court apparently was that they should be amply secured and allowed to retain what they got without regard to the fact that the real debt was less than half the amount nominally loaned. We think the correct view is, upon the theory of rescission through the corporation, that the Railway Company would be entitled to retain \$220,000 of first mortgage bonds as collateral.

The appellants, however, dispute the proposition that the Railway Company and the Bankers are the same in interest as respects the obligation to take an additional \$175,000 of second mortgage bonds. The District Judge who has had this case before him in many other aspects in addition to this one for a year and a half had no doubt about this and an examination of this record will in our judgment equally satisfy this court.

Fuller was the partner of Kissel, Kinnicutt and Company who was running this thing and who was the manager of the syndicate. He testified (Trans. 195) "subsequently a syndicate was formed to take over the holdings of Kissel, Kinnicutt and Company in the Power Company and in other property which they had acquired and which later became the property of the Railway Company." Notice the sequence: First the contract by Kissel, Kinnicutt and Company, next the forming of a syndicate and next the transfer of the interests thus acquired, including the holdings of Kissel, Kinnicutt and Company in the Power Company, to the Railway Company. The Railway Company was organized in the latter part of 1911 and since in the latter part of 1912 it already had out \$6,500,000.00 of bonds, it cannot be doubted that immediately upon its organization it took over these properties, including this interest in the Idaho-Oregon. This was in fact what the Railway Company was organized for. Fuller goes on; "the syndicate found itself owning a large interest in the Idaho-Oregon Company, and also, for the

benefit of the Idaho-Oregon Company and for the benefit of the entire situation it had built up here an absolutely independent and what was going to be a profitable enterprise consisting of a power plant, and a large interurban and urban street railway system" (referring to the properties of the Railway Company) "and they thereafter, as the Idaho-Oregon Company was in no position financially to take over the property of the Railway Company, and the syndicate had two interests, thought it would be wise to turn over all of their interests in the Idaho-Oregon Company to the Railway Company which they did, taking securities of the same class from the Idaho Railway for securities of the Idaho-Oregon Company, which they turned in to the Railway Company."

On September 27, two days after the meeting of September 25, there was a meeting of the Executive Committee of the Idaho-Oregon (Trans. 250) at which a four-party agreement between Kissel, Kinicutt and Company, the Idaho-Oregon, the Mainlands, and the Railway Company was adopted, which recognized and reduced to writing the existing status among the parties. This contract recites:

"WHEREAS the Bankers did on the second day of April, 1912, enter into an agreement with the Railway Company for the transfer to the said Railway Company of various of the properties mentioned in the preceding recital," etc., and * * *

"WHEREAS it is desired by the parties hereto to recognize the existing status of the parties and

to mutually release and discharge certain of the obligations contained in the said Syndicate Contract and to confirm others;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:"

"First: That paragraph Fifth of the said Syndicate Contract wherein and whereby the Bankers are granted an option to purchase from the Oregon Company for cash at eighty per cent. of their face value and accrued interest, the whole or any part of the Consolidated Bonds of said Oregon Company and prescribing the terms and conditions of said option and the whole of said Paragraph is hereby confirmed and continued in force and said option is by the Bankers transferred and assigned to the Railway Company and the Railway Company and the Oregon Company each recognize and confirm said assignment; PROVIDED that the provision of said Fifth Paragraph which grants said option on condition that the Bankers purchase \$1,500,000.00 face value of said Consolidated Bonds is hereby modified to the extent that the Oregon Company accepts the purchase of \$1,325,000 face value of said bonds heretofore made by the Bankers as hereinbefore stated as full and complete satisfaction of their obligation to purchase said \$1,500,000.00 face value of said Consolidated Bonds;

Second: The Sixth Paragraph of said Syndicate Contract relating to the retirement of prior lien bonds on the properties of the Oregon Company and providing for the issuance of Consolidated Bonds to

retire said prior lien bonds, and the purchase of said Consolidated Bonds by the Bankers at eighty per cent of the face value thereof is hereby confirmed and continued in force; save and except that the Railway Company is hereby substituted to the rights and liabilities of the Bankers in respect to the covenants of said paragraph to the same extent as if the Railway Company were expressly named therein and the Bankers are released from all obligations thereunder and provided that the Oregon Company shall on demand of the Railway Company in lieu of tendering sufficient Consolidated Bonds at eighty, to retire said prior lien bonds, procure to be issued and delivered to the Railway Company at ninety, First and Refunding Mortgage Five Per Cent Bonds of the Oregon Company to the extent that said First and Refunding Mortgage Five Per Cent Bonds are available for such purposes and Consolidated Bonds at 80 for the balance for which said First and Refunding Mortgage Bonds are not available."

It seems beyond dispute from these facts that the Railway Company had succeeded to all the rights and obligations of the Bankers under the Syndicate Agreement as early as April 2, 1912. This agreement of September 27th made two days after the meeting of September 25th, is expressly declared to recognize the existing status—evidently a status so far as the purchase of these bonds is concerned, dating at least from April 2. The substitution of the Railway Company for the Bankers certainly would not have taken place just as the smash was in pro-

cess. It had been contemplated from the beginning (as will be seen from an examination of the Syndicate Contract of September 19, 1911, Trans. 168) and was undoubtedly always in effect so far as the obligations of the parties were concerned and became legally in effect as soon as the Railway Company was organized; and the contract of April 2, like the contract of September 27, did not originate or establish the relations but merely recognized the relations existing in the pool.

It is nearly inconceivable that Kissel, Kinnicutt and Company separate and distinct, and as an independent obligation, would have gone on buying Idaho-Oregon bonds and transferring them as fast as acquired to the Railway, without the Railway Company being under any obligations to take care of the balance of the contract.

With reference to the Bates and Rogers deal and the further exchange predicated thereon, it apparently is conceded that the stock of the Railway Company is eliminated from consideration. The District Court was of the opinion (Trans. 143) that the Railway Company was itself insolvent at the time of the agreement.

Counsel still argue, however, that the Railway Company has incurred a liability for \$20,000 and should therefore be allowed \$20,000 out of the corpus of the Idaho-Oregon estate as a condition of avoiding the fraudulent exchange. It is to be observed that the agreement of the Railway Company (Trans. 402) is to re-purchase from Bates and Rogers at

their option the 25 second mortgage bonds of the Power Company or any part thereof after 18 months at the price of \$800 per bond, but if the option was not exercised within 60 days after the expiration of the said 18 months, the Railway Company was released from any further obligation. The contract is dated November 29, 1912. There is no evidence in the record that Bates and Rogers have ever exercised the option and if they had it is perfectly clear that it would cost the Railway Company nothing. The claim of Bates and Rogers in such case would be an unsecured claim against the Railway Company and the Railway Company has admitted its insolvency.

At the most if the Railway Company were solvent the liability in question is only a contingent liability and could not be made the basis of a recovery of \$20,000 or any other sum. It must first not only become an actual liability but have been paid.

In its opinion on this branch of the case the District Court (Trans. 144) says: "From the testimony and the surrounding circumstances no doubt is left in my mind that the Power Company could have made settlement directly with Bates and Rogers with its first mortgage bonds at a comparatively small discount; and that the devious course was adopted not upon their demand or for the interests of the Power Company, or from any necessity therefor, but for the sole purpose of furnishing a pretext of getting the first mortgage bonds out of the treasury of the Power Company and into the hands of the Railway Company, and for the interest alone of

those by whom the latter company was dominated.”

V.

We will endeavor to be brief in the discussion of the alleged errors in the admission of evidence. The whole record and the matters which now will influence the minds of this court in coming to its conclusions seem to us to demonstrate:

1. That the condition of the Railway Company in the latter part of 1912, which it was sought to show by the introduction of portions of its reports, was competent and material. This seems also to be established by the fact that counsel for the Railway Company subsequently stipulated regarding the Receivership and the insolvency of the Railway at a later time.

2. That the condition of the Idaho-Oregon Company was manifestly material in arriving at a just conclusion as to whether the Directors of the Railway Company acted in good faith or not in the transactions of Sept. 25 and Dec. 27, 1912.

3. That evidence of the marketability and the market price of the Idaho-Oregon first mortgage bonds at dates as nearly as possible approximating the dates of these transactions was also material and competent as bearing upon the same question of good faith.

4. That the operating history of the Power Company for the years immediately preceding the control, and for the one year that had expired after the

control of the Railway Company was material and competent as bearing upon the question of solvency or insolvency, which itself was material and as bearing upon the question of good faith or of fraudulent intent in the dealings of the Railway Directors as Directors of the Power Company.

The foregoing are the matters admitted over the objections of the Railway Company and for which the appellants assign error.

5. That the pretended record of an Executive Committee meeting on December 27, 1912, ought not to have been admitted as any evidence of authority under which the 278 bonds were exchanged. There were five members present at that meeting of the Executive Committee. It is not disputed that one was held. Two of those members, the Mainlands, testified that they have no recollection of any such things having transpired at the meeting and that they were unaware until about the time their depositions were taken that two exchanges of \$500,000 each had been authorized instead of one. It is true that William Mainland appears to have signed an agreement respecting this second exchange but this is not necessarily inconsistent with the veracity of his testimony. Doubtless the contract was prepared and handed to him for signature, with some casual explanation. Without careful examination he might easily have supposed, since the amounts were identical (and also because he probably knew there was not another \$500,000 of bonds available), that the same \$500,000 was referred to and that it was con-

nected up with the Bates and Rogers transaction to furnish an additional consideration to bolster it up.

The three other syndicate members of the Executive Committee and Mr. Wickes, the attorney who testified that he prepared the minutes, were all on the stand and were readily available to appellants counsel at any time as witnesses. The three members were not interrogated with reference to this transaction either before or after the Mainlands testified that to the best of their recollection there was no such transaction. Mr. Wickes was interrogated particularly with reference to this meeting and these minutes. The court may be interested to observe that he was not asked whether the transaction disputed by the Mainlands was had or not and does not say that the minutes are a correct record of what took place.

6. The later dealings of the Railway Company in carrying on their alleged plan to obtain the property without adequate payment and thus to defeat the just claims of the bondholders seems to us competent in view of the allegations of the Bill in Intervention and therefore the offer was made to prove their proposal to bid \$1,500,000 in December and their actual offer of \$1,000,000 in March.

7. The exclusion of the circular and plan of the New York committee of March 26, 1913, and the revised plan of May 1, 1913, (assignment of cross error X) have become immaterial since they appear in the record as exhibits to the answer of the State Bank to the Bill in Intervention.

8. Cross error XI is assigned upon the exclusion of a part of the deposition of Mr. Fuller (Trans. 468-472) in which, under cross-examination, he explained the efforts made by the New York committee to obtain the deposit of bonds including the bringing of the brokers to New York at the expense of the committee, who were present, and the representations made by the brokers to their customers. Appellees believe that this evidence was material and competent upon the question of good faith of the Railway Directors in dealing with the Idaho-Oregon affairs and as tending to establish the theory of the complete plan, continuously carried out, to obtain the property of the Idaho-Oregon Company for the Railway Company without adequate consideration.

9. Cross error XII is based upon the exclusion of a part of the deposition of Fuller (Trans. 473-475) in which upon cross examination Fuller admitted the payment of commissions to brokers in connection with their assistance in obtaining the deposit of the bonds of their customers with the New York committee. Appellees urge that this evidence also is competent and material as bearing upon the question of good faith and tending to establish the existence of a complete and continuous scheme having for its purpose the confiscation of the Idaho-Oregon Company.

SUMMARY.

1. The Railway Company was in complete control of the Power Company for almost a year prior to September 25, 1912, having obtained nearly all of the Power Company's stock, and by exercising the voting power of that stock had elected its own board of directors to be throughout the board of directors of the Power Company, which directors elected the President, Vice-President, Secretary, Manager and other principal officers and agents of the Railway Company to exercise the same functions in the Power Company.

2. On September 25, 1912, the Power Company was insolvent and was known to be so by the Railway Company and the common directors and the proceedings of September 25, 1912, were taken in the light of that knowledge.

3. The enterprise of the Railway Company had been unprofitable and it had created an enormous indebtedness with fixed charges greatly exceeding the income applicable thereto and the whole enterprise was in grave peril on this account.

4. The transactions of September 25 were carried through by a Board all of whom were interested in the transactions and would be favorably affected by the action alleged to have been taken. Eight members out of eleven were present, three of whom were further disqualified by being directly parties to the contract which was authorized. This left five or less than a quorum of the board who under

any theory were entitled to act. The fundamental action was adopted by an affirmative vote of four persons. The record found in the record book is false as to the vote.

Therefore the fundamental action of September 25 was not a corporate act.

5. The pretended action of September 25 was not taken in good faith for the benefit of the Power Company but was solely for the benefit of the Railway Company as a creditor, was of no benefit to the Power Company but on the contrary was a step in a scheme to destroy it, and was fraudulent and corrupt.

6. The pretended acts of September 25 were a fraud upon the Power Company as a corporation and was in addition thereto a direct fraud upon its creditors other than the Railway Company, against which the creditors can defend in their own right.

7. The acts of September 25 were an unlawful and fraudulent preference of the Railway Company and its directors who owned its securities, and that preference, in case the Power Company property should not sell for enough to meet all of its bonds, prejudices the first mortgage bondholders, and to the extent to which they are prejudiced they can interpose a successful defense against the preference.

8. The alleged proceedings of December 27 by which an additional exchange of bonds was author-

ized, was not a corporate act, there being no competent evidence that any such proceeding was had.

9. The syndicate directors of the Railway Company having determined in their own interests to get control of and foreclose the first mortgage bonds, buy in the property for a nominal sum, and pay off the Power Company's first mortgage bondholders with securities junior to the securities owned by them, adopted the devices of September 25th and December 27, 1912, as a part of the scheme and for the purpose of getting rid of their second mortgage bonds which in the proceeding would become worthless, sharing the property with the first mortgage bondholders and obtaining a foothold under the first mortgage which would assist them in controlling and foreclosing the first mortgage and dominating all the proceedings connected therewith.

10. The whole scheme is fraudulent and the decree of the District Court in setting it aside should be affirmed.

11. The District Court erred however in not distinguishing between the duty imposed upon the bondholders under the status declared and assented to in the last paragraph of the decree and the duty of the corporation if it were rescinding.

12. The duty of the corporation or a stockholder thereof, rescinding, would be to repay \$110,000 and interest. In the absence of evidence that the bondholders received any benefit from this \$110,000 or any part thereof or that the transaction added any-

thing whatever to the value or security of the mortgage estate, no such duty is imposed upon the bondholders.

The decree of the Circuit Court should be modified by directing the exchange of the 718 bonds without condition. If the Railway Company finds itself in an unfortunate position because thereof, it is placed in that position by its own fraud from which it is neither the duty of the first mortgage bondholders nor the court to relieve it.

Respectfully submitted,

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Cross-Appellants.*

